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No.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1986

SUN SHIP, INC.,
Petitioner,

— against —

CALIFORNIA AND HAWAIIAN SUGAR COMPANY

and

HALTER MARINE, INC.,
Respondents.

Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

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QUESTIONS PRESENTED

I

Did the Court of Appeals for the Ninth Circuit violate the principles of *Erie Railway Co. v. Tompkins* and the Rules of Decision Act when in a diversity case controlled by Pennsylvania substantive law it followed a 1905 decision of the English House of Lords on a point of Scottish law and refused to apply the rule of decision of an intermediate Pennsylvania appellate court, even though the Third Circuit Court of Appeals sitting in Pennsylvania had already declared that the Pennsylvania decision represented the applicable Pennsylvania rule for liquidated damages under the Uniform Commercial Code?

II

Did the Court of Appeals for the Ninth Circuit violate the principles of *Erie Railway Co. v. Tompkins* and the Rules of Decision Act when it:

— enforced a liquidated damages clause in a situation which was concededly unanticipated by the parties;

— awarded liquidated damages of $4.4 million notwithstanding its own finding that actual damages suffered by plaintiff were no more than $368,000;

— found defendant jointly and severally liable for the alleged damages to plaintiff, yet failed to apply the "one satisfaction" rule of Pennsylvania law, even though plaintiff had already settled with another defendant for consideration the value of which exceeded the liquidated damages at issue in this case; and

— implied a condition precedent for obtaining an extension under the contract in question when Pennsylvania law requires that such conditions be explicit?

LIST OF PARTIES AND RELATED COMPANIES

In addition to the parties listed in the caption to this case, at the ime that this cause of action arose, Sun Ship, Inc. was the vholly-owned subsidiary of Sun Company, Inc. The non-wholly-wned subsidiaries of Sun Company, Inc. are:

Alaska Bulk Carriers, Inc.
Blackfeet Indian Writing Company, Inc.
Canyon Reef Carriers, Inc.
Carnduff Gas Limited
China Sun Oil Company
Convenience Store Distributing Company
Deepsea Ventures, Inc.
East Texas Salt Water Disposal Company
Explorer Pipeline Company
Glacier Bay Transportation Corporation
Hemisphere Oil Company, Inc.
Industries for Tulsa, Inc.
Inland Corporation
Japan Sun Oil Company, Ltd.
Lavan Petroleum Company (LAPCO)
Lugrasa, S.A.
Mid-Valley Pipeline Company
National Railway Utilization Corporation
Northbrook Corporation
Nottingham Gas Limited
Nova, An Alberta Corporation Partnership
Ocean Mining Associates
Oil Casualty Insurance, Ltd.
Oil Insurance Limited
RADEP Pipeline Limited Partnership
Redwater Water Disposal Company Limited
Solartech Limited
Suntran Ltd.
Sun Cogeneration Limited Partnership
Sun Crude Marketing & Transportation Limited Partnership
Sun Energy Partners, L.P.
Sun Gas Transmission Limited Partnership
Sun Hydroponics Limited
Sun Offshore Gathering Limited Partnership
Sun Operating Limited P'ship
Sun Pennsylvania Limited Partnership
Sun-Canadian Pipe Line Company Limited
Suncor Inc.
SunOlin Chemical Company
The VLM Corporation
Trillium Exploration Corporation
Van Salt Water Disposal Company
Venezoil C.A.
West Texas Gulf Pipe Line Company
White River Shale Oil Corporation

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Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

Petitioner, Sun Ship, Inc. ("Sun"), prays that a Writ of Certiorari issue to review the decision of the United States Court of Appeals for the Ninth Circuit as amended on March 3, 1987, which affirmed the judgment of the United States District Court for the Northern District of California awarding C&H liquidated damages in the amount of $4.4 million, plus interest.

OPINIONS BELOW

The Opinion of the United States Court of Appeals For The Ninth Circuit ("the Opinion") reproduced in the Appendix hereto at 1a-11a is reported at 794 F.2d 1433. A decision denying Sun's Motion for Reconsideration but amending the Opinion is reproduced in the Appendix at 12a-13a and is reported at 811 F.2d 1264. The Judgment of the District Court is reproduced in the Appendix at 14a-16a. The Memorandum Decision and Report to the Court of the Special Master is reproduced in the Appendix at 17a-22a. The Findings of Fact and Conclusions of

Law of the Special Master is reproduced in the Appendix at 23a-27a.

JURISDICTION

The Decision of the Court of Appeals was rendered on July 22, 1986. Sun's timely Motion for Rehearing was denied on March 3, 1987. This Court has jurisdiction to review the decision of the Court of Appeals by Writ of Certiorari pursuant to 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Tenth Amendment to the United States Constitution provides:

> The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people.

28 U.S.C. § 1652 provides

> The laws of the several states, except where the Constitution or treaties of the United States or Acts of Congress otherwise require or provide, shall be regarded as rules of decision in civil actions in the courts of the United States in cases where they apply.

13 Pennsylvania Consolidated Statutes Annot., § 2-718(1) (1979) provides:

> Damages for breach by either party may be liquidated in the agreement, but only at an amount which is reasonable in the light of the anticipated or actual harm caused by the breach, the difficulties of proof of loss, and the inconvenience or non-feasibility of otherwise obtaining an adequate remedy. A term fixing unreasonably large liquidated damages is void as a penalty.

STATEMENT OF THE CASE

Parties to contracts must understand the circumstances surrounding business transactions, quantify the risks and benefits associated therewith, and agree as to how the risks and benefits are to be allocated. Parties who breach agreements are liable for damages which are "reasonably foreseeable". 5A *Corbin on Contracts* § 1010 at 79 (1964); UCC § 2-715(2). Liquidated damages clauses permit contracting parties to understand and quantify the risks associated with non-performance and make decisions accordingly. However, those clauses may not be applied in circumstances which the parties did not foresee at the time of the making of the contract. Nor may the clause be enforced in a way which punishes one party while granting a windfall to another.

In this case, the Ninth Circuit Court of Appeals ignored these precepts and the state law of Pennsylvania by affirming an award of $4.4 million liquidated damages when the parties had not designed the clause to operate in the situation that developed and when actual damages were, by the Court's own analysis, only $368,000.

A. Summary of the Case.

In 1979, plaintiff California Hawaiian Sugar Company ("C&H"), in conjunction with its naval architect, J. J. Henry Co., decided to build a large cargo-carrying ship in two separate pieces, half a continent apart. The ship was to consist of a large barge ("barge") which was to be attached to a "catug", or separate engine room built on catamaran hulls ("tug") by Halter Marine, Inc. ("Halter") and used as an integrated tug barge (ITB) for purposes of carrying sugar between the Hawaiian islands and the California coast. This ITB, in essence a large tanker, was built in two pieces in order to circumvent costly Coast Guard manning and safety requirements which would have resulted if the ship were built in one piece.

C&H chose to be its own general contractor and negotiated separate contracts with Sun Ship, Inc. ("Sun") and Halter.[1] Halter was to build the tug part of the ITB and deliver it to Sun by April 30, 1981 (the "Tug Availability Date") by sailing it from Chickasaw, Alabama to Chester, Pennsylvania. Halter was already constructing six other tugs similar to the C&H tug for the Amerada Hess Company, with Bethlehem Steel serving a dual role as the general contractor and barge builder. Sun was to build the barge section of the C&H ITB and then connect the tug and barge, perform certain tests and sea trials of the whole ship and deliver the completed ITB to C&H by June 30, 1981 ("the ITB Delivery Date").

The Barge Contract[2] between C&H and Sun contained the following provisions:

1. A liquidated damages clause (Article 8), calling for the payment of $17,000 per day for every day that delivery of *the ITB* was inexcusably delayed after June 30, 1981 (31a-32a); and

2. A *force majeure* clause (Article 7), providing that the ITB Delivery Date could be extended if the tug was unavailable to Sun due to reasons beyond Sun's control.[3] (29a-31a)

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[1] Excerpts from the Barge Contract between C&H and Sun are reproduced in the Appendix hereto at 28a-36a. The excerpts from the accompanying Interface Agreement between C&H, Sun and Halter are reproduced in the Appendix at 37a-39a. Excerpts from the Tug Contract between C&H and Halter are reproduced in the Appendix at 40a-45a.

[2] The shorthand denomination "the Barge Contract" is misleading, since that agreement went well beyond just requiring construction of the barge portion of the ITB. Rather, Sun was to construct the barge, perform all work necessary to connect it with the tug, conduct sea trials of the ITB, test it and obtain government certification for the resulting vessel. Sun was also responsible for the maintenance of a tight, staunch, seaworthy mating of the tug and barge. Only after these things had been accomplished, was it possible for Sun to make "Delivery" as required by Article 17(a) of the Barge Contract.

[3] Article 31 of the Barge Contract provides that Pennsylvania law would apply. The Court of Appeals, District Court and all parties below

There was no "Availability Date" or "Completion Date" established for the barge alone, since, as C&H's chief witness testified, "Delivery" of the completed ITB rather than of the barge alone was critical to C&H.[4] So long as the barge was completed in time for the ITB to be delivered shortly after arrival of the tug, the barge completion date was irrelevant and was left to Sun. Indeed, C&H refused on several occasions to accept delivery of the barge alone for some months after it had been completed.

Consistent with the above, all witnesses agreed that during negotiations, Sun and C&H had been exclusively concerned with damages from a delay *in the ITB*, because of the potential unavailability or high cost of substitute vessels. There were no presigning discussions of the damages which might arise from a delay in completing the barge alone in the absence of the tug, nor were there any discussions as to the parties' rights and responsibilities in the event that the tug was never made available to Sun.

Sun fell behind on its barge construction schedule, and, on the representation by C&H that Halter would make the tug available when the barge was ready for interconnection, Sun under a reservation of rights paid C&H liquidated damages of $3.3 million. (26a) The barge was ready for interconnection with the tug on January 11, 1982, and was itself entirely complete on March 16, 1982. (*Id.*) However, Halter, which had encountered major delays in its entire catug program, failed to make the tug available to Sun on the tug Availability Date, and also failed to deliver the tug when needed for interconnection. (*Id.*) In fact, Halter did not complete the tug until mid-July, 1982, and refused outright to sail the tug to Sun's yard in Pennsylvania, claiming that the tug was unseaworthy. (*Id.*) Significantly, a prototype tug had sunk off the Azores in the Fall of 1981, and Halter had already sued the owner of six other ITB's for more than $100 million in cost overruns.

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conceded the applicability of Pennsylvania law to interpret the Barge Contract.

[4] In ruling on a Motion to Compel Arbitration in this case, District Judge Robert Aguilar had found that there was no completion date for the barge alone in the Barge Contract.

C&H reached a settlement with Halter resulting in the forgiveness of over $4.2 million in liquidated damages and the release by Halter of a variety of claims against C&H.[5] The Settlement effectively extended the Halter's tug Availability Date to July 15, 1982, even though C&H continued to insist that Sun's ITB Delivery Date remained June 30, 1981. C&H sued Sun for liquidated damages in the amount of $17,000 per day from June 30, 1981, to July 15, 1982. C&H also claimed that Sun remained responsible to connect the tug and barge, even though C&H and Halter had *never* made the tug available at Sun's yard, as called for in the Barge Contract.

B. The District Court's Decision.

Following trial of the matter before a Special Master, the District Court adopted the Master's conclusion that when needed, the tug was not made available to Sun. (19a) The District Court therefore held that the tug's unavailability excused Sun from integrating and delivering the ITB. (26a)

However, the District Court adopted the Master's finding that Sun had an "independent" obligation to complete construction of the barge and deliver it to C&H by June 30, 1981, notwithstanding the tug's unavailability. (Conclusion of Law No. 7, at 27a) The Master and the District Court concluded that the liquidated damages clause should apply to any delay in the barge construction even though (a) the barge alone was commercially useless; (b) the tug was unavailable before, during and after the period of barge delay; (c) Halter refused ever to sail the tug to Pennsylvania; and (d) C&H had adamantly refused to accept delivery of the barge alone when it was completed.

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[5] The facts surrounding the Halter Settlement are set forth in the Affidavit of Harold P. Halter, reproduced in the Appendix hereto at 46a-47a. Halter's claims against the non-settling parties were the subject of an action in the Southern District of New York, *Halter Marine, Inc. v. Bethlehem Steel Corp., et al.*, No. 82 Civ. 008 (JMW), which was settled while Sun's appeal was pending. The Court of Appeals declined to reopen the record to reflect Halter's recovery of $13 million by way of settlement.

In analyzing the liquidated damages clause from the standpoint of the actual damages alleged by C&H, the Special Master had rejected as unproved *and* unanticipated some $3.732 million in "lost charter hire." (18a; and Finding of Fact No. 13, at 24a) However, the Master and the District Court found other "actual" damages totalling $1,829,000.[6] But the Master and District Court allowed no offset for conceded savings of $1,461,000 which resulted from late delivery of the ITB. (8a) The result was that C&H's $1.829 million in alleged actual damages were found to be reasonably proportionate to the $4.4 million in liquidated damages awarded to it. (Conclusion of Law No. 1, at 26a)

C. Disposition By The Court of Appeals.

The Court's Opinion is marked by a beguiling prose style which conceals a variety of logical flaws. The Opinion appears to uphold the liquidated damages clause as reasonable both when drafted and in light of subsequent events. But a careful reading of the Opinion reveals findings which necessarily make the clause invalid under *either* of these tests.

Thus, the Court found that "as the parties foresaw the situation, C&H would have a tug waiting connection but no barge and so no shipping. . . . Given the impact on C&H's [customers], liquidated damages of $17,000 a day were completely reasonable." (4a-5a) But at the same time, the Court acknowledged that "the situation as it developed was different from the anticipation. The barge was not ready but neither was the tug." (5a) Unaccountably, however, there is no analysis of the impact of this finding on the liquidated damages provision which, concededly negotiated for one situation, was sought to be applied in completely different circumstances.

Instead, the Court moved to a retrospective justification of the clause. Finding "clear error" in the District Court's failure to offset actual damages by the savings which also resulted from late

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[6] These so-called actual damages were mainly comprised of construction interest payments. However, C&H witnesses conceded that had the barge been delivered on June 30, 1981, interest payments would have been higher.

delivery of the barge, the Court found that "net actual damages suffered by C&H were $368,000." (8a) This sum was clearly disproportionate to the $4.4 million in liquidated damages sought by C&H. The Court nonetheless affirmed the District Court's award by resorting to $3,732,000 in charter hire allegedly lost by C&H as a result of ITB unavailability, finding that "[t]estimony supported the claim, but the district court made no finding as to whether the claim was proved or unproved." (9a) Because these alleged damages were supposedly "difficult of ascertainment" the Court upheld the clause. (10a)

The Court of Appeals based its analysis on a clear mistake, since the Master had made a specific finding *rejecting* C&H's charter hire damages as both unanticipated *and* unproven. (18a) When this finding was brought to the Court's attention in Sun's Petition for Rehearing, sound jurisprudence required a reexamination of applicable Pennsylvania law in a situation where actual damages were no more than $368,000, while the liquidated amount remained at $4.4 million. One justice voted for reexamination. (13a) But two panel members simply excised the charter hire language from the Opinion, and passed in silence the questions raised by the amendment. (12a-13a) The resulting Opinion erodes the foundations of American construction law. More specifically, it:

1. openly rejects Pennsylvania law which requires that a liquidated damages clause be reasonable *both* in light of the damages anticipated by the parties at the time of contracting *and* in light of the actual damages sustained as a result of the alleged breach;

2. disregards Pennsylvania law that where there are multiple causes for alleged damages from a breach of contract, the party seeking recovery is relegated to recovering its actual damages;

3. ignores Pennsylvania law which provides that a party is entitled only to one satisfaction for the damages incurred through a breach of contract (C&H had already settled with Halter in return for a release of claims worth in excess of the liquidated damages sought in this action); and

4. violates Pennsylvania law on construction of contracts by requiring Sun to deliver a barge by the original ITB Delivery Date even though the Barge Contract requires Sun to deliver a barge "completely connected with the Tug," (32a) and also provides for an extension of the ITB Delivery Date when the tug was "unavailable for interconnection with the barge." (30a)

REASONS FOR GRANTING CERTIORARI

The Ninth Circuit Opinion fashions a rule of liquidated damages in a way which totally ignores Pennsylvania law, the Uniform Commercial Code, and the *Restatement of Contracts*. The result will be great confusion for persons and entities contemplating multi-party construction contracts of the sort involved here. The result is also to affirm the award of a windfall to a plaintiff which, by settling with one party and litigating with another, has effectively recovered far more than it could ever have lost from the alleged breach.

This Court has warned prospective petitioners for certiorari that, "standing alone, a challenge to state-law determinations by the Court of Appeals would rarely constitute an appropriate subject of this Court's review." *Haring v. Prosise*, 462 U.S. 306, 314, n. 8 (1983). Professor Moore cautions, "It is not likely that a conflict between a decision by a Court of Appeals and an important state or territorial law will warrant certiorari unless the circumstances of the case are peculiar, as is possible when the decision of the Court of Appeals is so egregiously in conflict with an important local law as to call for the Court's power of supervision." 18 *Moore's Federal Practice*, ¶ 817.25-1[3], at SC 17-30 (1985).

This is such an egregious case. Here, the violation of *Erie* has risen to the level of a constitutional as well as statutory violation and conflicts with the decisions of other circuits. In *Six Companies of California v. Joint Highway District No. 13*, 311 U.S. 180 (1940), this Court refused to sanction the Ninth Circuit's rejection of an intermediate California Court of Appeals rule limiting the enforceability of liquidated damages clause. It is virtually

inconceivable that a federal court in 1987 would as brazenly flout *Erie* as did the Ninth Circuit in *Six Companies*. Yet the Ninth Circuit has now gone further than it did in 1940 by its evasion of the rule of *Unit Vending Corp. v. Tobin Enterprises, Inc.*, 194 Pa. Super. 470, 168 A.2d 750 (1961),[7] since the Third Circuit has already recognized that *Unit Vending* correctly states Pennsylvania law.[8]

The Ninth Circuit decision further conflicts with that of the Fifth Circuit in *Massman Construction Co. v. City Council of Greenville, Mississippi*, 147 F.2d 925 (5th Cir. 1945). Although the *Massman* court did not construe Pennsylvania law, *Massman* formed the basis for the *Restatement (Second) of Contracts*, § 356, which has been adopted in Pennsylvania as part of its decisional law. The Ninth Circuit conflict with *Massman* therefore represents an additional intercircuit dispute with regard to the application of Pennsylvania law.[9]

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[7] The Supreme Court does not insist that a lower federal court take as binding any decision of an intermediate level state court which would not be binding on another court in the same state. However, the federal court is still obliged to use such decisions to help predict which way the State Supreme Court would rule on an issue. Such intermediate decisions "must be given proper respect and cannot be disregarded simply because the federal court finds them unsound . . . ." 19 Wright & Miller, *Federal Practice and Procedure* § 4507, at 95-96 (1983).

[8] *Finkle v. Gulf & Western Mfg. Co.*, 744 F.2d 1015 (1984). This Court accords deference to a lower federal court's interpretations of the state law of the state in which the federal court sits. *Bernhardt v. Polygraphic Co. of America*, 350 U.S. 198 (1956). Presumably, the Third Circuit in *Finkle* should be entitled to that deference. The same is not true of the District Court and the Ninth Circuit in this case, both of which sit in California and neither of which is familiar with Pennsylvania law.

[9] The Ninth Circuit ignored *Massman*, and chose instead to apply a 1905 English House of Lords case which applies the very different Scottish rule on liquidated damages. *Clydebank Engineering & Shipbuilding Co. v. Yzquierdo y Castaneda* [1905] A.C. 6. Scottish law as expressed in *Clydebank*, measures the validity of a liquidated damages clause *only* at its inception and only invalidates such a clause if it is clear

The Ninth Circuit is clearly in error. It has created disharmony among the Circuits, and with related holdings of this Court. The resolution of this conflict is of critical importance. First, Pennsylvania law must be harmonized in order that those who contract pursuant to that law have a clear enunciation of their legal rights and responsibilities. Second, the error of the Ninth Circuit reaches beyond the borders of Pennsylvania to upset certain basic notions of contract law as established by the *Restatement (Second) of Contracts* and as codified in the Uniform Commercial Code which has been adopted by substantially every state. The decision thus has national impact upon the Commercial law and is of great importance beyond the particular parties and facts here involved.

I

THE U.S. COURT OF APPEALS FOR THE NINTH CIRCUIT MISCONSTRUED AND MISAPPLIED A CRITICAL QUESTION OF FAR-REACHING COMMERCIAL IMPACT IN A WAY THAT CONFLICTS WITH APPLICABLE PENNSYLVANIA LAW, THE DECISIONS OF OTHER CIRCUITS, AND OF THIS COURT. THE NEED FOR UNIFORMITY IN THIS AREA COMPELS THIS COURT'S REVIEW.

Pennsylvania has adopted the standard UCC provision regarding liquidated damages:

> (1) Damages for breach by either party may be liquidated in the agreement but only in an amount which is reasonable

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on its face that it was originally intended as a penalty. *See Robert Stewart & Sons, Ltd. v. Carapayanoti & Co., Ltd.* [1962] 1 A11 ER 418. Under *Clydebank*, a liquidated damages clause is *only* invalid when there is a gross discrepancy between the amount of liquidated damages specified in the contract and the greatest damages that could possibly be imagined *at the inception of the contract.* That is not Pennsylvania law. Had the Court of Appeals forthrightly set forth the Scottish rule, it would have been obvious that Scottish law of 1905 was so radically different from Pennsylvania law that the Court could not possibly apply it.

> in light of the anticipated or actual harm caused by the breach, the difficulties of proof of loss, and the inconvenience or non-feasibility of otherwise obtaining an adequate remedy. A term fixing unreasonably large liquidated damages is void as a penalty.

13 Pennsylvania Statutes Annot. § 2-718. Although the wording of the UCC is cast in the disjunctive, Pennsylvania is in accord with UCC commentators in applying a conjunctive test.[10] Under Pennsylvania law, a liquidated damages clause must be reasonable at its inception *and* in the light of actual damages. *Unit Vending Corp v. Tobin Enterprises, Inc.*, 194 Pa. Super. 470, 473, 168 A.2d 750 (1961); *see Silco Vending Co. v. Quinn*, 315 Pa. Super. 367, 461 A.2d 1324, 1327 n. 4 (1983); *Harris v. Dawson*, 239 Pa. Super. 316, 360 A.2d 706 (1976) (recognizing the *Unit Vending* test); *see also Germain Lumber Co. v. United States*, 56 F. Supp. 1001 (W.D. Pa. 1944).

The Third Circuit (sitting in Pennsylvania) specifically found that *Unit Vending* sets forth the Pennsylvania test for UCC liquidated damages clauses:

> Pennsylvania follows the principles set forth in the original *Restatement of Contracts* (1932) with regard to the non-enforcement of contractual provisions that establish penalties. *See Restatement of Contracts* § 339. When the parties have made a reasonable forecast as to just compensation for an injury that was difficult to estimate at the time they entered into the contract, that provision will be deemed to be one for liquidated damages, and enforceable. On the other hand, a provision that calls for payment on non-performance

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[10] *See, e.g.*, 3 Hawkland, *Uniform Commercial Code Series*, § 2-718:02, at 427-38 (1984) ("Estimates [of damages] that substantially miss the mark should be suspect, and as a matter of actual practice, most courts have so held.") Professor Corbin has also concluded that courts must be influenced by knowledge of subsequent events and stated that "a provision would always have to pass the test of hindsight, however erroneously the parties may in good faith have tried to fix their damages." 5 *Corbin on Contracts*, § 1063 at p. 363-64 (1964) and *1984 Supp.* at 277.

> or on default that is disproportionate to the value of the performance promised or the injury that has actually occurred will be deemed a penalty. *See Corbin on Contracts* §§ 1063-1066, (1964). As the Pennsylvania Superior Court has stated, 'If the amount of damages assessed is subsequently adjudged unreasonable in the light of either anticipated or actual harm, the contractual provision will be voided as a penalty: Restatement, Contracts, § 339, 12A PS § 2-718.' *Unit Vending Corp. v. Tobin Enterprises*, 194 Pa. Super. 470, 473, 168 A.2d 750, 751 (1961).

Finkle v. Gulf & Western Mfg. Co., supra, 744 F.2d at 1021; *accord Harris v. Dawson, supra*;

Under *Erie*, the Ninth Circuit was obliged to follow the *Unit Vending* test unless it was "convinced by persuasive evidence that the highest court of the state would decide otherwise." *West v. American Telephone & Telegraph Co.*, 311 U.S. 223, 237 (1940). A federal court sitting in diversity simply has no constitutional[11] power to formulate a rule of decision, whatever the "guise" the federal court may employ to cover up its failure to apply state law.[12] Where the law is unclear, the federal court has a duty to

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[11] The Court has never declared what specific constitutional provision *Erie* recognizes although it has affirmed *Erie's* constitutional basis. *See Hanna v. Plumer*, 380 U.S. 460, 471-72 (1965). Most commentators appear to treat *Erie* as recognizing a rule of federal comity, grounded in the Tenth Amendment. *See, e.g.*, 19 Wright & Miller, *supra*, § 4505 at 46-47. Other commentators treat *Erie* as derived from the Full Faith and Credit Clause, Article Four of the United States Constitution. *See, e.g.*, Annot., *Judicial Notice—Foreign Law*, 7 A.L.R. Fed. 921, 926-27 (1971).

[12] A federal court may not substitute a mere recital of *Erie* for an actual application of the relevant law. See *Bernhardt v. Polygraphic Co. of America, supra*. Though its decision is replete with numerous citations to Pennsylvania law, the Ninth Circuit here effectively decided to follow an English case involving the Spanish Navy's claims under Scottish law—a case which appears never to have been cited let alone followed by any other American court. Yet the Court of Appeals refused to discuss or refer to relevant Pennsylvania decisions that were repeatedly drawn to its attention.

ascertain how the state's highest court would rule on the issue. *Birnbaum v. United States*, 588 F.2d 319, 326 (2nd Cir. 1978). "A refusal to accept a perceptible trend may be as much a failure to follow state law as a refusal to apply existing precedent because it is somewhat ambiguous." *Id.*

The Court of Appeals Opinion never explicitly rejects the conjunctive test of *Unit Vending*. Stating, however, that "mechanically to read it as Pennsylvania law . . . would be a mistake," the Court embarks on an analysis which upholds the liquidated damages clause, without ever finding explicitly that it complied with *either* of the tests imposed by *Unit Vending*. In fact, no such finding could ever have been made, since, as the Court of Appeals itself conceded (a) the parties never anticipated that Sun's clause should be enforced in the situation in which the tug remained unavailable; and (b) actual damages were no more than $368,000.

A. As Interpreted By the Court of Appeals, the Clause Was Invalid From Its Inception.

Both pre- and post-UCC Pennsylvania cases require that where a court is judging the reasonableness of a liquidated damages clause at its inception, it must examine the *intention* of the parties to the contract. *See Lancellotti v. Thomas*, 314 Pa. Super. 1, 491 A.2d 117 (1985); *Robert F. Felte, Inc. v. White*, 451 Pa. 137, 302 A.2d 347 (1973); *Gross v. Exeter Machine Works*, 277 Pa. 363, 121 A. 195, 197 (1923). If a liquidated damages clause designed for one situation is sought to be enforced in another, the clause must be voided and actual damages (if any) awarded. *See, e.g., Lackawanna Boiler & Grate Co. v. Lee Coal Storage Co.*, 290 Pa. 561, 139 A.315 (1927) (liquidated damages clause invalidated where parties had not intended to compensate mine owner for damages in the situation that actually did occur).

The Pennsylvania approach is similar to this Court's rule in *Priebe & Sons, Inc. v. United States*, 332 U.S. 407 (1947). In *Priebe*, the government sought to enforce a liquidated damages clause against a contractor who was four days late in securing certification for a cargo of dried eggs, even though the govern-

ment made no call for delivery of the eggs until four days after the certification had been obtained. The Court stated:

> But under this procurement program, delays of the contractors which did not interfere with prompt deliveries plainly would not occasion damage. That was as certain when the contract was made as it later proved to be. Yet that was the only situation to which the provision in question could ever apply. Under these circumstances, this provision for 'liquidated damages' could not possibly be a reasonable forecast of just compensation for the damage cause by a breach of contract. It might as respondent suggests, have an *in terrorem* effect of encouraging prompt preparation for delivery. But the argument is a tacit admission that the provision was included not to make a fair estimate of damages to be suffered but to serve only as an added spur to performance. It is well settled contract law that courts do not give their imprimatur to such arrangements [citations omitted]. All provisions for damages are, of course, deterrents of default. But an exaction of punishment for a breach which could produce no possible damage has long been deemed oppressive and unjust [citation omitted].

Id. at 413.

As in *Priebe*, it was certain when the contract was made here that a delay in barge completion would cause no damage if the tug remained unavailable. Indeed, tug unavailability was explicitly made a *force majeure* warranting an extension of the ITB Delivery Date. (30a) As in *Priebe*, enforcing the liquidated damages clause where the tug was unavailable could not possibly be a "reasonable forecast of just compensation" for damages caused by barge unavailability. As in *Priebe*, enforcing the clause in such a situation can only have an *in terrorem* effect.

The Court of Appeals itself conceded that "*the situation was different from anticipation*," (5a) in that the parties had originally intended liquidated damages to apply where the tug was complete but the barge was not. For such a situation, the clause was clearly reasonable at its inception. But the Court was faced with a much different—and unanticipated—situation, i.e. the

barge, though late, was complete before it was actually needed. Further, the parties could not have foreseen that alleged design defects in the tug would prevent its ever being delivered to Sun. In that different situation both new and old Pennsylvania law voids the liquidated damages clause as having failed of its essential purpose. However, the Court of Appeals, mesmerized by the English House of Lords dispensing justice to the Spanish Navy, ignores the more prosaic dictates of *Priebe* and of Pennsylvania law.[13]

B. The Enormous Disparity Between Actual And Liquidated Damages Makes The Clause Void Under Pennsylvania Law.

Under Pennsylvania law, even a clause which is reasonable at its inception (which this clause was not) is void if the amount of liquidated damages is grossly disproportionate to the actual damages. "A provision in the contract providing for a recovery of damages for any sum of money which is out of proportion with the actual loss will not be enforced by the courts, as it is considered a penalty, and in such case the court will only permit a recovery for the actual loss, if any, sustained." *Dorrance v. Lehigh Valley Coal Co.*, 13 F. Supp. 73, 76 (M.D. Pa. 1936), *aff'd*, 88 F.2d 334 (1937); *Finkle v. Gulf & Western Mfg. Co.*, *supra*; *Unit Vending Corp. v. Tobin Enterprises, Inc.*, *supra*. Here, the liquidated damages clause cannot stand, since the award of $4.4 million is vastly disproportionate to C&H's maximum possible actual damages of $368,000.

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[13] Among these dictates ignored by the Ninth Circuit is "the general rule . . . that, where the covenant embraces the performance of several acts and a single sum is named, it will be treated as a penalty. . . ." *Gross v. Exeter Machine Works*, *supra*, 121 A. at 197; *Wilkinson v. Colley*, 164 Pa. 35, 30 A. 286 (1894); *Keck v. Bieber*, 148 Pa. 645, 24 A. 170 (1892); *see also S.L. Rowland Construction Co. v. Beall Pipe & Tank Corp.*, 14 Wash. App. 297, 540 P.2d 912, 922 (1975) ("It is literally hornbook law [that] in drafting liquidated damages clauses care should be taken to see that, if the clause applies to breaches of varying seriousness, the amount to be paid is adjustable to the probable damage.")

In its original Opinion, the Court of Appeals sidestepped *Unit Vending* and adopted a sort of "uncertainty" test which is not known to Pennsylvania law. The test seems to be that if anticipated and/or actual damages are uncertain, the clause may stand. The Court speculated (wrongly) that C&H's actual damages could also include "uncertain" charter hire losses of up to $4 million. (9a) When told that these losses had been *rejected* as unanticipated and unproved, the Court deleted the paragraph in its opinion relating to them, without changing its conclusion. (13a) However, without its spurious charter hire losses, the Court is left with nothing "uncertain." Instead, as the Court itself conceded, actual damages were certainly no more than $368,000 —a sum entirely inadequate under Pennsylvania law to support a liquidated damages award of $4.4 million.

II

THE COURT OF APPEALS DISREGARDED PENNSYLVANIA LAW ON LIQUIDATED DAMAGES WHERE PLAINTIFF'S INJURY HAS RESULTED FROM MULTIPLE CAUSES.

A. When Plaintiff Has Contributed To Its Own Injury, It Will Be Relegated To Recovering Only The Actual Damages Caused By Defendants.

The Court of Appeals did not dispute that (a) C&H acted as its own general contractor; (b) C&H, and its architectural consultant, J.J. Henry, were responsible for the design of the tug (which Halter claimed was unsafe); (c) C&H was also responsible *vis a vis* Sun for supervising Halter and insuring timely tug availability; and (d) by its settlement with Halter, C&H effectively extended Halter's tug Availability Date from April 30, 1981, to July 15, 1982 (without extending Sun's ITB Delivery Date for the interconnected and tested ITB). Yet, the Court utterly disregarded the Pennsylvania rule that where plaintiff's damages are due partly to defendant's conduct and partly to plaintiff's own acts or omissions, the plaintiff cannot collect liquidated damages but is instead entitled only to the actual damages which may fairly be attributed to defendant. *See Depart-*

ment of Transportation v. W.P. Dickerson & Son, Inc., 42 Pa. Commw. 359, 400 A.2d 930, 933, (1979). ("It is particularly well-settled that a party may not retain liquidated damages for the amount of delay caused by its own actions."); *Pittsburgh Die Sinkers Lodge v. Pittsburgh Forgings Co.*, 255 F. Supp. 142, 145 (W.D. Pa. 1966); *Department of Property and Supplies v. Burger*, 11 Pa. Commw. 332, 312 A.2d 100, 106 (1973); *American Engineering Co. v. United States*, 24 F. Supp. 449 (E.D. Pa. 1938).

The Court of Appeals did not mention any of those Pennsylvania cases or their rule, which has been endorsed by this Court. *See United States v. United Engineering & Contracting Co.*, 234 U.S. 226 (1914) (where work was delayed first by fault of the owner and thereafter by contractor, this Court refused to enforce the liquidated damages provision of the contract.) This Court in *United Engineering* stated:

> We think the better rule is that when the contractor has agreed to do a piece of work within a given time, and the parties have stipulated a fixed sum as to liquidated damages, not wholly disproportionate to the loss for each day's delay, in order to enforce such payment, the other party must not prevent the performance of the contract within the stipulated time; and that where such is the case, and thereafter the work is completed, though delayed by the fault of the contractor, the rule of the original contract cannot be insisted upon, and liquidated damages measured thereby are waived.

Id., at 242.

Here, C&H bargained for delivery of *an ITB*, and for substantial liquidated damages for a failure by Sun to deliver that ITB. (*See* Barge Contract at 30a, 32a) Yet the District Court excused Sun's duty to deliver the ITB, because it found that *C&H* had never made the tug available to Sun. (16a) As in *United Engineering*, plaintiff here frustrated defendant's performance and was at least partly responsible for its own loss. The Court of Appeals affirmed that finding and conclusion of law. Yet, incredibly, the Court of Appeals ignores the necessary result of that finding under Pennsylvania law.

B. A Liquidated Damages Clause Will Not Be Enforced Where It May Be Seen With Certainty That The Injury Complained Of Would Have Occurred Regardless Of Defendant's Conduct.

Even if the District Court had found (which it did not) that C&H had been entirely blameless, Pennsylvania law still provides that a liquidated damages clause may not be enforced where it can be seen with certainty that the alleged damage would have occurred regardless of a particular defendant's conduct. That is precisely the point of *Restatements (Second) of Contracts*, § 356, which has been adopted in Pennsylvania.[14] Illustration (4) to that section sets forth an example in which A contracts to build a grandstand for B's race track and agrees to pay $1000 a day for every day's delay in completing it. A's delay of ten days does not trigger the liquidated damages clause when B is delayed even longer in obtaining permission to operate the race track. The Court of Appeals limits Illustration (4) as applying only to a "case in which the defaulting contractor was alone in his default." But Illustration 4 is not so limited, and specifically states that liquidated damages may not be assessed *because B's damages were not sustained as a result of A's delay*. This is precisely the situation here, where an independent cause for delay of the ITB preceded the delay of the barge, and continued for several months after the barge was complete.

Illustration (4) is based on *Massman Construction Co. v. City Council of Greenville, Mississippi, supra*,[15] where a bridge which had been planned for completion in 350 days was delayed through

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[14] *See Finkle v. Gulf & Western Mfg. Co., supra*, 744 F.2d at 1021. A *Restatement* section, even if not explicitly adopted by a state, should not be ignored by a federal court, but, if adopted by a large number of states, should be used as an indication of how a state's highest court would rule on an issue. *Patch v. Stanley Works*, 448 F.2d 483, 488 (2d Cir. 1971). Here, the *Restatement* section in question has been adopted as the law of Pennsylvania, but the Court of Appeals declined to apply it.

[15] It should be noted that the Editors of the Second *Restatement*, in adopting, *Massman's* reasoning, reversed the conclusion of Illustration (4) in the First *Restatement of Contracts*.

the fault of several defendants (and for other reasons) for a further 109 days. While the bridge contractor alleged various excuses for the delay, the Court's decision turned on the fact that though the bridge was late, the road leading up to it was not completed until even later. Thus, the *Massman* Court refused to enforce a liquidated damages clause on the grounds that the delay in completing the bridge was not the legally cognizable cause of the actual damages:

> The entire bridge was finished at least 30 days before it could be utilized on account of the lack of a road leading to it from the Arkansas side of the river. 'All dressed up and nowhere to go' the bridge sat unutilized for 30 days or more after its full completion, so that the delay by appellant did not cause a delay in beginning the operation of the toll bridge with the attendant losses for non-operation which the contract sought to provide against.

147 F.2d at 926.

There is good reason for the Court of Appeals to ignore *Massman*. The facts in that case are too close to the situation in this case. Like the bridge in *Massman*, the barge was "all dressed up and nowhere to go" for four months after being completed. The *only* result of earlier barge completion would have been *increased* costs to all parties. The conclusion here, as in *Massman* and Illustration (4), is obvious: the delay in the completion of the barge did not cause the injury anticipated by the parties when they agreed to the liquidated damages clause sought to be enforced by the Court of Appeals.

The Ninth Circuit has found that where fault is shared for construction delay, all parties are "jointly and severally" liable for the entire damage alleged by plaintiff. However, this tort concept has seldom, if ever, been applied in construction contract cases. Rather, "multiple cause" situations are best analyzed in "critical path" terms used in *Morris Mechanical Enterprises, Inc. v. United States*, 554 F. Supp. 433 (Ct. Cl. 1982). The *Morris* case, though cited repeatedly to the Court of Appeals, was entirely unmentioned in its Opinion. In *Morris*, one of several prime contractors had delayed in delivering a chiller under a government construc-

tion contract. Like C&H here, the government in *Morris* was acting as a general contractor. Like Sun, the chiller contractor was required not only to deliver a chiller but also to provide "start-up" service for the chiller after it had been installed and connected. Another contractor (like Halter) had been granted "generous extensions of time," even though it was that other contractor's delay which ultimately prevented final connection of the chiller to the whole unit. *Id.* at 441. Instead of enforcing the liquidated damages clause, the *Morris* Court ruled that subsequent events and delays not attributable to the contractor had removed the chiller from the "critical path."

The federal rule in *Morris*, which echoes *Priebe*, is exactly that of *Massman*, *Restatements* § 356 and thus Pennsylvania. But the Court of Appeals ignored *Morris*, along with *Massman* and Pennsylvania law. Had the Court of Appeals applied the *Morris* analysis, it could not have found that the barge was on the "critical path" from June 1981 to March 1982, since the tug portion of the ITB was unavailable throughout that period and even after it. Rather than tackling that troubling question, the Court preferred to award C&H a windfall.

The real ground of the Court of Appeals decision is perhaps its fear that if it had accepted Sun's arguments, "[t]he continued default of both parties would operate to take each of them off the hook." (7a) However, Pennsylvania does not let defaulting parties get off "scot-free" (as the Court of Appeals feared), but rather apportions the *actual* damages between them. *Dorrance v. Lehigh Valley Coal Co.*, *supra*, 13 F. Supp. at 76. Had the Court of Appeals applied Pennsylvania law, it would have awarded actual damages and not a "windfall" double recovery to C&H.

III

THE COURT OF APPEALS DISREGARDED THE PENNSYLVANIA RULE THAT THERE CAN BE ONLY ONE SATISFACTION FOR DAMAGE INCURRED THROUGH A BREACH OF CONTRACT.

As noted above, the Court avoided complex issues of damage allocation by a simple finding of "joint and several" liability on

the part of Halter and Sun. In doing so, the court ignored equally complex issues raised by C&H's agreement to extend Halter's tug Availability Date in consideration for Halter's release of claims valued by it at many millions of dollars.

Pennsylvania law is clear that a party to a contract who has sustained damage due to a breach of that contract is entitled to *only* one satisfaction for the damage incurred. *Lambert v. Durallium Products Corp.*, 364 Pa. 284, 72 A.2d 66 (1950); *Coleco Industries v. Berman*, 567 F.2d 569 (3d Cir. 1977). That is the *universal* rule where there is a finding of joint and several liability in either contract or tort. Otherwise, the recovery is a windfall, not compensation.[16] Thus, the Pennsylvania Supreme Court stated in *Lambert*:

> The measure of damages for breach of contract is *compensation* for the loss sustained. The aggrieved party can recover nothing more than will compensate him. Plaintiffs should be placed as nearly as possible in the same position they would have occupied had there been no breach.

72 A.2d at 67 (emphasis in original).

In *Coleco Industries* plaintiff brought an action against several defendants for losses arising out of Coleco's acquisition of a company. One of the defendants settled out of court with Coleco for $350,000. After trial on the merits, the District Court held (and the Third Circuit affirmed) that any recovery due from the remaining defendants had to be offset by Coleco's $350,000 in settlement recovery. 567 F.2d at 577.

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[16] Highlighting the fact that such penalties are void as against public policy, comment a to the *Restatement (Second) of Contracts*, 356 states:

> The parties to a contract may effectively provide in advance the damages that are to be payable in the event of breach as long as the provision does not disregard the principal of compensation . . . . The central objective behind the system of contract remedies is compensatory, not punitive. *Punishment of a promisor for having broken his promise has no justification on either economic or other grounds*, and a term providing such penalty is unenforceable on grounds of public policy. (emphasis added)

The Court of Appeals in this case found Sun jointly and severally liable. (7a) It also found that C&H had settled with Halter as one of the joint obligors. The value of that settlement was at least equivalent to the $4.2 million in liquidated damages claimed by C&H to be due from Halter. Knowing these facts, the Court failed to apply the Pennsylvania (and universal) one-satisfaction rule. Presumably, the liquidated damages provision in each contract sought to estimate the loss that would ensue if C&H did not have an ITB. But in effect C&H has already recovered from that "loss" through its settlement with Halter. C&H now recovers a second time from Sun in violation of the Pennsylvania one-satisfaction rule.[17]

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[17] Even prior to the amendment of the Opinion, one commentator took note of the anomalous result of the Ninth Circuit's reasoning:

> Interestingly, while the court seems justified in holding Sun liable for damages in this concurrent breach situation, the Court did not consider whether in fact the concurrent breaches were enabling C&H to recover double damages through the liquidated damages provisions in both contracts. Presumably, the liquidated damages provisions sought to estimate the loss that would ensue if C&H did not have an integrated tug-barge. Either party's breach would have caused this loss, and the liquidated damage clause in each contract presumably sought to estimate that loss. Having in effect recovered for that loss through its settlement with Halter, C&H was now recovering a second time from Sun.
>
> Whether the liquidated damages clause is measure against actual or anticipated loss, it leads to an overestimation of damages in the concurrent breach situation in which the double recovery problem arises. Thus, there would have been some basis for the court to refuse to enforce the clause in this case. Other courts have refused to enforce liquidated damages clauses when the breach is not of the type that would be reasonably approximated by the Clause.

Zaretsky, "Damages For Concurrent Default," *Commercial Damages: A Guide to Remedies in Business Litigation*, Vol. 2 (Jan.-Feb., 1987). The author concludes that the Court appropriately upheld the clause "in view of the modern trend towards enforcing the parties' bargain. . . ." However, he also states that the double recovery issue should have been addressed by the Ninth Circuit. One might note in this regard that *Erie* mandates the use of state law, rather than "modern trends", in determining the enforceability of liquidated damages clauses.

The Court of Appeals in this case did not bother to distinguish *Lambert* or even *Coleco*. It chose simply to pass in silence yet another inconvenient state rule. This Court has already showed its willingness to reverse a lower federal court which openly announced its intention of flouting state law. *See, e.g., Six Companies of California, supra.* Should it do any less where a lower federal court does the same *sub silentio*?

IV

THE COURT OF APPEALS VIOLATED PENNSYLVANIA LAW ON THE CONSTRUCTION OF CONTRACTS IN ITS ANALYSIS OF THE AGREEMENT BETWEEN SUN AND C&H.

In Pennsylvania (as everywhere else), "[o]ne part of the contract cannot be so interpreted as to annul another part, but, rather, writings which comprise an agreement must be interpreted as a whole." *Village Beer & Beverage v. Vernon D. Cox & Co., Inc.*, 327 Pa. Super. 99, 475 A.2d 117, 121 (1984). The Court of Appeals not only implied a barge availability date, where none was stated, but also held that barge completion was a precondition to Sun's right to an extension of its ITB Delivery Date on account of the tug's unavailability. The result mocks Pennsylvania rules of contract interpretation.

The Court of Appeals insists that Sun had an obligation to deliver a "Vessel" on June 30, 1981 and that "Vessel" can only mean the barge, not the ITB. (4a) This interpretation effectively annuls Article 7(b) of the Barge Contract, which provides for an extension of the "ITB Delivery Date" for the "Vessel" where a delay has been "caused by . . . unavailability of the Tug to Contractor for joining to the Vessel". (30a) Article 7(b) is closely linked to the other provisions of the Agreement. Thus, Article 8 imposes liquidated damages in only one situation, i.e. where "Delivery" is delayed beyond the "ITB Delivery Date" (31a).

Moreover, had they been applied, Pennsylvania rules regarding joint liability, contribution, and the apportionment of actual damages would have negated the author's legitimate concerns over possible windfalls to either C&H or Sun.

Article 1(c) defines "ITB Delivery Date" as the date on which "Delivery" pursuant to Article 17 was to take place. (29a) Under Article 17(a), "Delivery" could be accomplished by Sun *only* after the barge had been attached to the tug, and all tests and sea trials of the functioning ITB had been completed. (32a) Interpreting the various clauses of the Barge Contract as a whole, therefore, "Delivery" (to which all liquidated damages obligations are expressly linked) (31a) could not be made until the tug had been made available to Sun. In the absence of the tug, "Delivery" was physically impossible, and under Article 7(b), the Delivery Date had necessarily to be extended and liquidated damages tolled.

However, the Master ruled that barge completion was an *implied* precondition to any extension on account of tug unavailability. (19a; and Finding of Fact No. 19, at 25a) Notwithstanding its earlier conclusion that Sun was *excused* from performing the Interface Agreement because the tug was never made available to it, and despite C&H's own concession that Sun was not in breach of that Agreement, the District Court held that Sun was *not* in compliance with the Interface Agreement because it had not completed the barge by June 30, 1981.

This Court will search in vain for any obligation under either the Interface Agreement or the Barge Contract to complete the barge on *any* stated date, or much less to complete it prior to being entitled to an extension under Article 7(b). Under Pennsylvania law, "[t]he general rule remains that where an act or event mentioned in a contract is not expressly made a condition precedent, it will not be so construed, unless such *clearly* appears to be the intention of the parties." *American Leasing v. Morrison Co.*, 308 Pa. Super. 318, 454 A.2d 555, 559 (1982) (emphasis added); *Sharp v. McKelvey*, 196 Pa. Super. 138, 172 A.2d 580 (1961). As noted above, Article 7(b) of the Barge Contract expressly provides for an extension of the ITB Delivery Date where there is a delay "caused by Purchaser" or by "unavailability of the tug to Contractor for joining to the Vessel, where it is determined that Contractor has complied with all obligations under the Interface Agreement." (30a) There is no precondition in Article 7(b) relating to completion of the barge. Yet, there is

no reference whatsoever in the Ninth Circuit Opinion to Article 7(b) or the possibility of an extension of the ITB Delivery Date. Instead the Master's conclusion—clearly contrary to *American Leasing*—was allowed to stand.

CONCLUSION

By the Court's reasoning, C&H had a right to recover $4.4 million in liquidated damages from Sun, and an additional $4.2 million in such damages from Halter. C&H settled with Halter and must be assumed to have received value equivalent to its $4.2 million claim. It has now been awarded an additional $4.4 million from Sun. This $8.6 million recovery has been upheld as reasonable recompense for $368,000 in actual damages.

There is a battery of legal principles in Pennsylvania and elsewhere designed to prevent such windfalls. All were ignored by the Ninth Circuit. The Ninth Circuit knew of *Unit Vending*, but chose not to apply it. The Ninth Circuit was aware that the Third Circuit in *Finkle* had affirmed *Unit Vending* as the law of Pennsylvania. It knew that the Fifth Circuit's *Massman* result had entered Pennsylvania jurisprudence via the *Restatement (Second) of Contracts*. Finally, it had notice that these authorities had been affirmed by *Priebe*, *Morris*, and a variety of other cases.

All of this is in a context of critical importance to the construction industry, and makes this case more flagrant than *Six Companies*. The Ninth Circuit's evasion of applicable state law cannot be less than deliberate, and mandates the issuance of the writ.

Dated: June 1, 1987

Respectfully submitted,

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For Publication
United States Court of Appeals
For the Ninth Circuit

Nos. 85-2310, 85-2356
DC No. C-82-0916-JPV

California and Hawaiian Sugar Company,
a California Corp.,
Plaintiff/Counterdefendant/Appellee/Cross-Appellant.

vs.

Sun Ship, Inc., a Pennsylvania Corp.,
Defendant/Counterclaimant/Appellant/Cross-Appellee.

OPINION

Appeal from the United States District Court
for the Northern District of California
John P. Vukasin, District Judge, Presiding

Argued and Submitted May 14, 1986
San Francisco, California

Before: NELSON, CANBY and NOONAN, Circuit Judges
NOONAN, Circuit Judge

Jurisdiction in this case is based on the diversity of citizenship of California and Hawaiian Sugar Company (C and H), a California corporation; Sun Ship, Inc. (Sun), a Pennsylvania corporation; and Halter Marine, Inc. (Halter), a Louisiana corporation. Interpreting a contract which provides for construction by the law of Pennsylvania, we apply Pennsylvania law. The appeal is from a judgment of the district court in favor of C and H and Halter on the main issues. Reviewing the district court's interpretation of the contract anew as a matter of law and respecting the finding of fact of the district court when not clearly erroneous, we affirm the judgment in all respects.

BACKGROUND

C and H is an agricultural cooperative owned by fourteen sugar plantations in Hawaii. Its business consists in transporting raw

sugar—the crushed cane in the form of coarse brown crystal—to its refinery in Crockett, California. Roughly one million tons a year of sugar are harvested in Hawaii. A small portion is refined there; the bulk goes to Crockett. The refined sugar—the white stuff—is sold by C and H to groceries for home consumption and to the soft drink and cereal companies that are its industrial customers.

To conduct its business, C and H has an imperative need for assured carriage for the raw sugar from the islands. Sugar is a seasonal crop, with 70 percent of the harvest occurring between April and October, while almost nothing is harvestable during December and January. Consequently, transportation must not only be available, but seasonably available. Storage capacity in Hawaii accommodates not more than a quarter of the crop. Left stored on the ground or left unharvested, sugar suffers the loss of sucrose and goes to waste. Shipping ready and able to carry the raw sugar is a priority for C and H.

In 1979 C and H was notified that Matson Navigation Company, which had been supplying the bulk of the necessary shipping, was withdrawing its services as of January 1981. While C and H had some ships at its disposal, it found a pressing need for a large new vessel, to be in service at the height of the sugar season in 1981. It decided to commission the building of a kind of hybrid—a tug of catamaran design with two hulls and, joined to the tug, a barge with a wedge which would lock between the two pontoons of the tug, producing an "integrated tug barge." In Hawaiian, the barge and the entire vessel were each described as a Mocababoo or push boat.

C and H relied on the architectural advice of the New York firm, J.J. Henry. It solicited bids from shipyards, indicating as an essential term a "preferred delivery date" of June 1981. It decided to accept Sun's offer to build the barge and Halter's offer to build the tug.

In the fall of 1979 C and H entered into negotiations with Sun on the precise terms of the contract. Each company was represented by a vice-president with managerial responsibility in the area of negotiation; each company had a team of negotiators; each

company had the advice of counsel in drafting the agreement that was signed on November 14, 1979. This agreement was entitled "Contract for the Construction of One Oceangoing Barge for California and Hawaiian Sugar Company By Sun Ship, Inc." The "Whereas" clause of the contract identified C and H as the Purchaser, and Sun as the Contractor; it identified "one non-self-propelled oceangoing barge" as the Vessel that Purchaser was buying from Contractor. Article I provided that Contractor would deliver the Vessel on June 30, 1981. The contract price was $25,405,000.

Under Article I of the agreement, Sun was entitled to an extension of the delivery date for the usual types of force majeure and for "unavailability of the Tug to Contractor for joining to the Vessel, where it is determined that Contractor has complied with all obligations under the Interface Agreement." (The Interface Agreement, executed the same day between C and H, Sun, and Halter provided that Sun would connect the barge with the tug.) Article 17 "Delivery" provided that "the Vessel shall be offered for delivery fully and completely connected with the Tug." Article 8, "liquidated Damages for Delay in Delivery" provided that if "Delivery of the Vessel" was not made on "the Delivery Date" of June 30, 1981, Sun would pay C and H "as per-day liquidated damages, and not as a penalty" a sum described as "a reasonable measure of the damages"—$17,000 per day.

On the same date C and H entered into an agreement with Halter to purchase "one oceangoing catamaran tug boat" for $20,350,000. The tug (the "Vessel" of that contract) was to be delivered on April 30, 1981 at Sun's shipyard. Liquidated damages of $10,000 per day were provided for Halter's failure to deliver.

Halter did not complete the tug until July 15, 1982. Sun did not complete the barge until March 16, 1982. Tug and barge were finally connected under C and H's direction in mid-July 1982 and christened the Moku Pahu. C and H settled its claim against Halter. Although Sun paid C and H $17,000 per day from June 30, 1981 until January 10, 1982, it ultimately denied liability for any damages, and this lawsuit resulted.

ANALYSIS

Sun contends that its obligation was to deliver the barge connected to the tug on the delivery date of June 30, 1981 and that only the failure to deliver the integrated hybrid would have triggered the liquidated damage clause. It is true that Article 17 creates some ambiguity by specifying that the Vessel is to be "offered for delivery completely connected with the Tug." The case of the barge being ready while the tug was not, is not explicitly considered. Nonetheless, the meaning of "Vessel" is completely unambiguous. From the "Whereas" clause to the articles of the agreement dealing with insurance, liens, and title, "the Vessel" is the barge. It would require the court to rewrite the contract to find that "the Vessel" in Article 8 on liquidated damages does not mean the barge. The article takes effect on failure to deliver "the Vessel"—that is, the barge.

Sun contends, however, that on such a reading of the contract, the $17,000 per day is a penalty, not to be enforced by the court. The barge, Sun points out, was useless to C and H without the tug. Unconnected, the barge was worse than useless—it was an expensive liability. C and H did not want the barge by itself. To get $17,000 per day as "damages" for failure to provide an unwanted and unusable craft is, Sun says, to exact a penalty. C and H seeks to be "paid according to the tenor of the bond"; it "craves the law." And if C and H sticks to the letter of the bond, it must like Shylock end by losing; a court of justice will not be so vindictive. Breach of contract entitles the wronged party only to fair compensation.

Seductive as Sun's argument is, it does not carry the day. Represented by sophisticated representatives, C and H and Sun reached the agreement that $17,000 a day was the reasonable measure of the loss C and H would suffer if the barge was not ready. Of course they assumed that the tug would be ready. But in reasonable anticipation of the damages that would occur if the tug was ready and the barge was not, Article 8 was adopted. As the parties foresaw the situation, C and H would have a tug waiting connection but no barge and so no shipping. The anticipated damages were what might be expected if C and H could not transport the Hawaiian sugar crop at the height of the season.

Those damages were clearly before both parties. As Joe Kleschick, Sun's chief negotiator, testified, he had "a vision" of a "mountain of sugar piling up in Hawaii"—a vision that C and H conjured up in negotiating the damage clause. Given the anticipated impact on C and H's raw sugar and on C and H's ability to meet the demands of its grocery and industrial customers if the sugar could not be transported, liquidated damages of $17,000 a day were completely reasonable.

The situation as it developed was different from the anticipation. The barge was not ready but neither was the tug. C and H was in fact able to find other shipping. The crop did not rot. The customers were not left sugarless. Sun argues that, measured by the actual damages suffered, the liquidated damages were penal. We look to Pennsylvania law for guidance. Although no Pennsylvania case is squarely on point, it is probable that Pennsylvania would interpret the contract as a sale of goods governed by the Uniform Commercial Code. *Belmont Industries, Inc. v. Bechtel Corp.*, 425 F. Supp. 524, 527 (E.D. Pa. 1976). The governing statute provides that liquidated damages are considered reasonable "in the light of anticipated or actual harm." 12A Pa. Cons. Stat. Ann 2-718(1) (Purdon 1970) (Pennsylvania's adoption of the Uniform Commercial Code).

The choice of the disjunctive appears to be deliberate. The language chosen is in harmony with the Restatement (Second) of Contracts § 356 (1979), which permits liquidated damages in the light of the anticipated or actual loss caused by the breach and the difficulties of proof of loss. Section 356, Comment b declares explicitly: "Furthermore, the amount fixed is reasonable to the extent that it approximates the loss anticipated at the time of the making of the contract, even though it may not approximate the actual loss."

Despite the statutory disjunctive and the Restatement's apparently blessing of it, the question is not settled by these authorities which must be read in the light of common law principles already established and accepted in Pennsylvania. *Carpel v. Saget Studios, Inc.*, 326 F. Supp. 1331, 1333 (E.D. Pa. 1971); 13 Pa. C.S.A. § 1103. Prior to the adoption of the Uniform Commercial Code, Pennsylvania enforced liquidated damage clauses that its

courts labeled as nonpenal, but equitable considerations relating to the actual harm incurred were taken into account along with the difficulty of proving damages if a liquidated damage clause was rejected, e.g. *Emery v. Boyle*, 200 Pa. 249, 49 A. 779 (1901). We do not believe that the *U.C.C.* overrode this line of reasoning. Indeed, in a lower court case, decided after the *U.C.C.*'s enactment, it was stated that if liquidated damages appear unreasonable in light of the harm suffered, "the contractual provision will be voided as a penalty." *Unit Vending Corp. v. Tobin Enterprises*, 194 Pa. Super. 470, 473, 168 A.2d 750, 751 (1961). That case, however, is not on all fours with our case: *Unit Vending* involved an adhesion contract between parties of unequal bargaining power; the unfair contract was characterized by the court as "a clever attempt to secure both the penny and the cake" by the party with superior strength. *Id.* at 476, 168 A.2d at 753. Mechanically to read it as Pennsylvania law governing this case would be a mistake. The case, however, does show that Pennsylvania courts, like courts elsewhere, attempt to interpret the governing statute humanely and equitably.

The Restatement § 356 Comment b, after accepting anticipated damages as a measure, goes on to say that if the difficulty of proof of loss is slight, then actual damage may be the measure of reasonableness: "if, to take an extreme case, it is clear that no loss at all has occurred, a provision fixing a substantial sum as damages is unenforceable. See Illustration 4." Illustration 4 is a case of a contractor, A, agreeing to build B's race track by a specific date and to pay B $1,000 a day for every day's delay. A delays a month, but B does not get permission to operate the track for that month, so B suffers no loss. In that event, the Restatement characterizes the $1,000 per day as an unenforceable penalty. Sun contends that it is in the position of A: no actual loss was suffered by C and H because C and H had no tug to mate with the barge.

This argument restates in a new form Sun's basic contention that the liquidated damages clause was meant to operate only if the integrated tug barge was not delivered. The argument has been rejected by us as a misinterpretation of the contact. But in its new guise it gains appeal. If Illustration 4 is the present case,

Sun is home scot-free. The Restatement, however, deals with a case where the defaulting contractor was alone in his default. We deal with a case of concurrent defaults. If we were to be so literal-minded as to follow the Restatement here, we would have to conclude that because both parties were in default, C and H suffered no damage until one party performed. Not until the barge was ready in March 1982 could C and H hold Halter for damages, and then only for the period after that date. The continued default of both parties would operate to take each of them off the hook. That cannot be the law.

Sun objects that Halter had a more absolute obligation to deliver than Sun did. Halter did not have to deliver the integrated tug, only the tug itself; it was not excused by Sun's default. Hence the spectacle of two defaulting contractors causing no damages would not be presented here. But Sun's objection does not meet the point that Halter's unexcused delivery would, on Sun's theory, have generated no damages. The tug by itself would have been no use to C and H.

We conclude, therefore, that in this case of concurrent causation each defaulting contractor is liable for the breach and for the substantial damages which the joint breach occasions. Sun is a substantial cause of the damages flowing from the lack of the integrated tug; Sun cannot be absolved by the absence of the tug.

Sun has a final argument. Even on the assumption that it is liable as a substantial cause of the breach of contract, Sun contends that the actual damages suffered by C and H for lack of the integrated tug boat were slight. Actual damages were found by the district court to consist of "interest on progress payments, unfavorable terms of conversion to long-term financing, and additional labor expense." No dollar amount was determined by the district court in finding that these damages "bore a reasonable relationship to the amount liquidated in the Barge Contract."

The dollar value of the damages found by the district judge is, to judge from C and H's own computation, as follows:

Additional Construction Interest	$1,486,000
Added Payments to J. J. Henry	161,000
Added Vessel Operating Expenses	73,000
C and H Employee Costs	109,000
	$1,829,000

But "actual damages" have no meaning if the actual savings of C and H due to the nondelivery of the integrated tug barge are not subtracted. It was clearly erroneous for the district judge to exclude these savings from his finding. These savings, again according to C and H's own computation, were:

Transportation savings	$ 525,000
Lay-up Costs	$ 936,000
	$1,461,000

The net actual damages suffered by C and H were $368,000. As a matter of law, Sun contends that the liquidated damages are unreasonably disproportionate to the net actual damages.

C and H urges on us the precedent of *Bellefonte Borough Authority v. Gateway Equipment & Supply Co.*, 442 Pa. 492, 277 A.2d 347 (1971), forfeiting a bid bond of $45,000 on the failure of a contractor to perform a municipal contract, even though the loss to the municipality was $1,000; the disproportion was 45 to 1. But that decision is not decisive here. It did not purport to apply the Uniform Commercial Code. Rules appropriate for bids to the government are sufficiently different from those applicable between private parties to prevent instant adoption of this precedent. A fuller look at relevant contract law is appropriate.

Litigation has blurred the line between a proper and a penal clause, and the distinction is "not an easy one to draw in practice." *Lake River Corp. v. Carborundum Co.*, 769 F.2d 1284, 1290 (7th Cir. 1985) (per Posner, J.). But the desire of courts to avoid the enforcement of penalties should not obscure common law principles followed in Pennsylvania. Contracts are contracts because they contain enforceable promises, and absent some overriding public policy, those promises are to be enforced. "Where each of the parties is content to take the risk of its

turning out in a particular way" why should one "be released from the contract, if there were no misrepresentation or other want of fair dealing?" *Ashcom v. Smith*, 2 Pen. & W. 211, 218-219 (Pa. 1830) (per Gibson, C.J.). Promising to pay damages of a fixed amount, the parties normally have a much better sense of what damages can occur. Courts must be reluctant to override their judgment. Where damages are real but difficult to prove, injustice will be done the injured party if the court substitutes the requirements of judicial proof for the parties' own informed agreement as to what is a reasonable measure of damages. Pennsylvania acknowledges that a seller is bound to pay consequential damages if the seller had reason to know of the buyer's special circumstances. *Keystone Diesel Engine Co. v. Irwin*, 411 Pa. 222, 191 A.2d 376 (1963). The liquidated damage clause here functions in lieu of a court's determination of the consequential damages suffered by C and H.

These principles inform a leading common law case in the field, *Clydebank Engineering & Shipbuilding Co. v. Yzquierdo y Castaneda*, 1905 A.C. 6. The defendant shipyard had agreed to pay 500 pounds per week per vessel for delay in the delivery of four torpedo boat destroyers to the Spanish Navy in 1897. The shipyard pointed out that had the destroyers been delivered on schedule they would have been sunk with the rest of the Spanish Navy by the Americans in 1898. The House of Lords found the defense unpersuasive. To prove damages the whole administration of the Spanish Navy would have had to have been investigated. The House of Lords refused to undertake such a difficult investigation when the parties had made an honest effort in advance to set in monetary terms what the lack of the destroyers would mean to Spain.

C and H is not the Spanish Navy, but the exact damages caused its manifold operations by lack of the integrated tug boat are equally difficult of ascertainment. C and H claimed that it suffered $3,732,000 in lost charter revenues. Testimony supported the claim, but the district court made no finding as to whether the claim was proved or unproved. The district court did find that the loss of charter revenues had not been anticipated by the parties. But that finding has no bearing on whether the loss occurred.

Within the general risk of heavy losses forecast by both parties when they agreed to $17,000 per day damages, a particular type of loss was pointed to by C and H as having happened.

Proof of its loss is difficult—as difficult, perhaps, as proof of loss would have been if the sugar crop had been delivered late because shipping was missing.

Whatever the loss, the parties had promised each other that $17,000 per day was a reasonable measure. The court must decline to substitute the requirements of judicial proof for the parties' own conclusion. The Moku Pahu, available on June 30, 1981, was a great prize, capable of multiple employments and enlarging the uses of the entire C and H fleet. When sophisticated parties with bargaining parity have agreed what lack of this prize would mean, and it is now difficult to measure what the lack did mean, the court will uphold the parties' bargain. C and H is entitled to keep the liquidated damages of $3,298,000 it has already received and to receive additional liquidated damages of $1,105,000 with interest thereon, less setoffs determined by the district court.

On the comparatively minor issue as to whether C and H is entitled to arbitration of its claim for a contract price reduction, Article 32 of the contract provides for arbitration of all disputes arising out of the contract with exceptions not applicable here. But no dispute remains for arbitration. The district court found that Sun was excused from performing its mating obligations because the tug was not made available on March 11, 1982 when the barge was ready. C and H is not entitled to reimbursement from Sun for the costs it incurred in having the mating performed later by others. C and H was entitled to reimbursement for what it had paid Sun itself for the mating. But on the point system agreed to by the parties, this would represent 100 points out of possible 10,000 or 1 percent of the contract price. According to testimony offered on behalf of C and H, Sun credited C and H with a sum representing these 100 points. C and H's claim has been met. Arbitration is unnecessary.

Sun has counterclaimed against C and H and Halter for misrepresentation, charging that the two companies had con-

cealed from Sun the true progress on the tug. The alleged damages consist in the expenses Sun incurred trying to meet its own contractual obligations to build the barge. This counterclaim lacks plausibility on its face. No damage is inflicted on a party which is induced to perform its own contract. The cases Sun invokes to support its position involve "active interference" by one party with another party's performance. They have no applicability here.

Uncontradicted testimony indicates, moreover, that Sun was aware of the delay. Employees of Sun were in touch with Halter. It would have been surprising if they had not been. Sun attempts to get around its actual knowledge by contending that it was not officially informed of the tug's progress. But the kind of knowledge that precludes the possibility of fraud does not have to be officially conveyed. Sun's counterclaim is meritless.

AFFIRMED.

FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

Nos. 85-2310
85-2356

D.C. No.
C-82-0916-JPV
[794F.2d 1433]

California and Hawaiian Sugar Company,
a California Corp.,
Plaintiff/Counterdefendant/Appellee/Cross-Appellant,

v.

Sun Ship, Inc., a Pennsylvania Corp.,
Defendant/Counterclaimant/Appellant/Cross-Appellee.

ORDER

Filed March 3, 1987

Before: Dorothy W. Nelson, William C. Canby, Jr. and John T. Noonan, Jr., Circuit Judges

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COUNSEL

Dinkelspiel, Donovan & Reder. David Wilson and Ben I. Hamburg.
San Francisco, California, for the defendant-appellant.

McCutchen, Doyle, Brown & Enersen, John Reese and Lloyd D. McCormick;
Lillick, McHose & Charles and Graydon S. Staring.
San Francisco, California, for the plaintiff-appellee.

ORDER

The opinion in this case filed July 22, 1986 is amended as follows:

1. Delete the text in the first full paragraph at 1439 beginning with the sentence "C and H claimed that it . . ."

2. The first sentence of the second full paragraph at 1439 should be added to the preceding paragraph and changed from "Proof of this loss is difficult" to "Proof of its loss is difficult."

The full court has been advised of the suggestion for rehearing en banc and of the amendments and no judge of the court has requested a vote to rehear the matter en banc. The motion for rehearing is denied and the suggestion for rehearing en banc is rejected. Judge Nelson dissents from the denial of the petition for rehearing.

The motion for leave to file a supplement to the petition for rehearing is denied.

United States District Court
Northern District of California

No. C-82-0916 JPV

California and Hawaiian Sugar Company,
a California corporation,
Plaintiff,

vs.

Sun Ship, Inc., a Pennsylvania corporation,
Defendant.

Sun Ship, Inc., a Pennsylvania corporation
Counterclaimant,

vs.

California and Hawaiian Sugar Company,
a California corporation and
Halter Marine, Inc., a Louisiana corporation,
Counterdefendants.

JUDGMENT

Plaintiff and counterdefendant California and Hawaiian Sugar Company's ("C&H's") Complaint for a declaration and payment of liquidated damages was heard by this Court on January 4, 1985 on the basis of the Memorandum Decision and Findings of Fact and Conclusions of Law of the Special Master, filed herein on November 15, 1984 and December 20, 1984.

The motions of plaintiff and counterdefendant C&H and of counterdefendant Halter Marine, Inc. ("Halter") for orders granting judgment in their favor against defendant and counterclaimant Sun Ship, Inc. ("Sun Ship") on the Second, Third, Fourth, Fifth and Sixth Causes of Action of Sun Ship's Counterclaim were heard by this Court on January 4, 1985.

The motion of counterclaimant Sun Ship for summary adjudication on the First Cause of Action of its Counterclaim against C&H was heard by this Court on March 14, 1985.

The Court having overruled each and every objection of Sun Ship to the Findings of Fact and Conclusions of Law of the Special Master, having confirmed and adopted as its own the Findings of Fact and Conclusions of Law of the Special Master, having ordered that the motions of C&H and Halter for summary judgment on the Second, Third, Fourth, Fifth and Sixth Causes of Action of Sun Ship's Counterclaim be granted, and having further ordered that the motion of Sun Ship for summary adjudication in connection with the First Cause of Action of its Counterclaim against C&H be granted, it is

ORDERED, ADJUDGED AND DECREED AS FOLLOWS:

1. That C&H shall retain the liquidated damages paid by Sun Ship in the amount of $3,298,000.

2. That C&H shall recover from Sun Ship an additional sum of $1,105,000 in liquidated damages, with interest as provided by the Contract, until entry of judgment and thereafter as allowed by law, less the offsets set forth in paragraphs 3 and 4.

3. That Sun Ship is entitled to an offset reducing the recovery of C&H of an amount equal to three-fourths of one percent (¾%) of the Contract Price, together with interest thereon at the Contract rate from September 16, 1982, until entry of judgment, and thereafter as allowed by law.

4. That Sun Ship is entitled to an additional offset reducing the recovery of C&H in an amount equal to three-fourths of one percent (¾%) of the Contract Price, together with interest thereon at the Contract rate from March 23, 1983, until entry of judgment, and thereafter as allowed by law.

5. That the Second, Third, Fourth and Sixth Causes of Action of the Counterclaim of Sun Ship against C&H be and the same hereby are dismissed on the merits with prejudice, and that Sun Ship takes nothing by such causes of action of its Counterclaim.

6. That the Fifth and Sixth Causes of Action of the Counterclaim of Sun Ship against Halter be and the same hereby are

dismissed on the merits with prejudice, and that Sun Ship takes nothing by such causes of action of its Counterclaim.

7. That Sun Ship shall have a declaratory judgment on the First Cause of Action of its Counterclaim against C&H as follows: that Sun Ship was excused from performing any mating or interconnection obligations under the Barge Contract and Interface Agreement and was relieved from all liabilities and responsibilities to C&H relating to mating, interconnection, testing, certification, guarantee and delivery of an Integrated Tug Barge.

8. That each party shall bear its own costs in this action.

Dated: March , 1985
(May 1, 1985)

The Honorable John P. Vukasin, Jr.
United States District Court Judge

In the United States District Court
For the Northern District of California

No. C 82-0916 JPV

California and Hawaiian Sugar Company,
a California corporation,
Plaintiff,

vs.

Sun Ship, Inc., a Pennsylvania corporation,
Defendant.

And related cross actions.

MEMORANDUM DECISION
REPORT TO COURT

The parties to the above entitled matter having stipulated and the court, Honorable John P. Vukasin, having ordered that the undersigned may serve as special master "for final resolution all issues raised by C&H's complaint, by Sun Ship's defense thereto and by Sun Ship's second and third counterclaims for unjust enrichment and restitution insofar as they relate to C&H's retention of liquidated damages;" and such issues having been tried before the undersigned, as special master with evidence presented October 29 thru November 9, 1984, and having been submitted after argument:

The special master now renders his decision:

In November, 1979, C&H, desirous of adding a so-called integrated tug-barge to its small fleet of raw sugar transporting ships, entered into three contracts: 1) With Halter Marine for the construction and delivery, by April 30, 1981, of a tug; 2) With Sun Ship for construction and delivery of a barge by June 30, 1981; and 3) With both Halter and Sun in contemplation of Sun assuming ultimate responsibility for connecting ("mating") the two units. The three contracts make reference to each other, but the only express incorporation is in Article 2 of the interface agreement, in which Sun agrees that the "Contract Work" defined in the barge agreement "shall include" Sun's mating responsibilities.

The barge contract calls for liquidated damages of $17,000 per day, to be paid by Sun to C&H for every day that delivery of the barge is inexcusably delayed. The barge was in fact not in condition for delivery until March 16, 1982. Sun paid the $17,000 per day, under "reservation of rights", until January 11, 1982.

C&H seeks recovery of additional sums of liquidated damages, plus interest, into May, 1982, and Sun resists on a variety of grounds. Hence, the above stipulation and order present to the special master the express question of whether the liquidated damage clause of the barge contract is valid and enforceable; if so, in what amount if any is Sun liable or, on the other hand, is Sun entitled to any restitution of sums already paid? Only if the above questions are decided adversely to C&H is another question presented: If liquidated damages are unavailable to C&H, is Sun liable for an amount of actual damages?

Pennsylvania law (which expressly controls interpretation and enforcement of the subject contract) permits contract provision for liquidated damages "only at an amount which is reasonable in the light of the anticipated or actual harm caused . . . A term fixing unreasonably large liquidated damages is void as a penalty." (12A Pa. Cons.Stat.Ann. § 2-718(1)) Though the statute uses the disjunctive, cases generally appear to require that both anticipated *and* actual harm reasonably reflect the liquidated amount.

C&H's evidence here meets both tests.

Prospective damages included interest on progress payments advanced, financing charges, time of C&H officers/employees and of J.J. Henry, loss of crop, loss of favorable sales opportunities and expense of alternate shipping. These totalled in excess of the $17,000 provided for. (Claimed damage, anticipated or actual, from loss of income generated by use of C&H ships for other than sugar hauling are rejected as unproven and not within Sun's reasonable expectation of risk.)

When delay occurred, C&H was able to find alternate shipping. No crop was lost, and any added transportation expense was questionable.

Actual damage did result, though, including interest on progress payments, unfavorable terms of conversion to long term financing, and added labor expense, both by C&H and by Henry. These were shown to reasonably equate with the liquidated damages provided for in the barge contract.

The liquidated damage provision therefore meets the test of reasonableness as to both anticipated and actual harm to C&H. Sun next urges that it did not breach any obligation under either the barge or the interface contract, and that any delay was excused by the failure of Halter to make the tug available at any time. The tug was never made available to Sun at its Chester, Pennsylvania, yard, as contemplated, and it was therefore physically impossible for Sun to perform its mating duties under the interface agreement. Sun was excused from performing that contract.

Sun was obligated to perform the barge contract, however, independently of and apart from the interface agreement. The fact that each contract made reference to the other, and that C&H's ultimate goal was to obtain delivery of an integrated tug-barge in no way relieved either Sun or Halter of the responsibility to diligently execute its responsibilities, under the barge and tug contracts, respectively, regardless of the performance of the other. Events which would excuse Sun from prompt performance and permit extension of the barge completion date were expressly and clearly set out in the barge contract. Unavailability of the tug was included among such events "where it is determined that Contractor [Sun] has complied with all obligations under the Interface Agreement". The interface agreement, as mentioned above, provides that the "Contract Work" under the barge contract shall "include" (not "consist of") the mating of tug and barge. "Contract Work" is defined in the barge contract as consisting of the construction and delivery of the barge. Thus, to have performed "all obligations" and gain entitlement to use tug delay as extending time for its further performance, Sun would have constructed the barge by June 30, 1981, that being its sole obligation under the barge contract. This it did not do.

The subject matter and facts of this case make it unamenable to the "critical path" or "controlling cause" concepts urged by

Sun. Performance of neither the tug contract nor the barge contract was dependent, either expressly or in practice, on the other. Although Sun and Halter attempted to, and generally did, monitor each other's work schedule and performance carefully, the principal purpose of each seemed to be to permit planning to finish slightly less delinquent than the other. It is true that C&H's aim was to get a functioning ship, and that either of the completed components alone would not achieve that purpose, but that is not to say that the completion of one would not benefit C&H. For example, is it not likely that earlier completion by either Sun or Halter would hae [sic] put pressure on the other to accelerate its work? And, contrary to Sun's assertion that its delay actually saved C&H money (storage costs and interest on final payments), if either Sun or Halter had completed its unit on schedule, C&H's cost of (interest on) the unproductive purchase price paid on that unit, as well as any storage and maintainance [sic] costs incurred by C&H, would be recoverable as items of damage against the remaining delinquent contractor.

This last point reveals another reason the critical path formula proposed by Sun would be unreasonable in this case. As Sun would have the rule applied, where two or more contractors are tardy, the unfortunate purchaser of their services must look only to the most tardy—the last to perform—for recompense for damage. But this produces an anomaly: In this case, e.g., and assuming no excuse for delay by either, through the latter half of 1981 Sun was accrueing [sic] liability for damage caused by it—interest on progress payments, for example—and Halter would be accrueing [sic] obligation to pay damages caused by its delay—interest on progress payments theretofore paid to it, for example. These liabilities continued to exist and grow in 1982, until the first of them finally completed performance. At that moment, as Sun would have it, the other party not only becomes the sole remaining cause for continueing [sic] delay, but becomes solely responsible for compensating C&H for the damage suffered, and the party who managed to perform, perhaps only a few days before the other, is absolved. Both common sense and good conscience argue against interpreting any of the cases cited by Sun as so holding.

Sun next argues that even if the concept of controlling cause is rejected, Sun was at worst a concurring cause of any damage suffered by C&H, that C&H erroneously relies on tort law on this issue, and that C&H has, but has not met, a burden of apportioning and fixing with reasonable certainty that part of any damage caused by Sun. In this connection, Sun asserts that, as C&H has negotiated a settlement with Halter for a valuable consideration, C&H is now seeking double recovery. (Sun again argues in this connection that delay in the barge "had no impact" on delivery of the integrated ship, as its nine month delay was exceeded by Halter's one year delay. The delinquent has the burden of showing excuse for delay; contrary to Sun's assertion, the inference could fairly be drawn that greater promptness by either Sun or Halter would have inspired greater effort by the other. And again, as discussed above, it is anomalous to characterize a delay as having "no impact" simply because of the fortuitous (and fortunate, Sun would have it) circumstance of someone else being more tardy, presumably as little as one day later. Under this formula, what would be the result if both had been late but finished simultaneously? Would neither be liable, or both?)

While the delay in the barge and the delay in the tug concurred in causing delay in the integrated vessel, hence concurred in causing any damage flowing from that, little of C&H's clear and convincing evidence of loss related to that event; but C&H did, as we have found, suffer substantial damage flowing solely from the delay in completion of the barge (and, presumably, damage seperate [sic] but of a similar nature flowing from delay in the tug), and as Sun's duty to complete the barge was wholly separate from any obligation of Halter, no concurrency considerations arise. C&H argues that two months would have been required for mating after the barge was completed, even if the tug had been made previously available, and that Sun should therefore be charged with delay into May, 1982. Sun argues that, as its demand for availability of the tug by January 11, 1982, was not met, liquidated damages should at the latest be cut off on that date. Sun's breach, as we have found, continued at least until March 16, when the barge was substantially complete. The only question is whether liability should persist beyond that date. It is concluded that C&H has failed to sustain the burden of showing

that Sun would have been incapable of completing mating by that date, March 16, 1982, had the tug been made available. Thus, March 16, 1982, will be taken as the cut-off date for accrual of liquidated damages.

IN SUMMARY, Sun's duty to perform the barge contract was separate and distinct from, and in no way dependant on, performance of either the tug or interface agreement. Sun failed to comply with all its obligations, by delaying completion of the barge, and was therefore not excused by unavailability of the tug. Sun's breach brought the liquidated damage provision into operation, for the period from July 1, 1981, thru March 16, 1982, at 17,000 [sic] per day. That amount reasonably reflected both C&H's anticipated and actual damage. Judgment should therefore be rendered in favor of C&H and against Sun in the amount of liquidated damages accrueing [sic] over that period, with credit for amounts heretofore paid, with interest on all accrued and overdue amounts.

Award of costs, and attorney fees if any, is reserved to the court, such questions not having been referred to the special master, and, in any event, more appropriately being reserved until disposition of the remaining bifurcated issues pending in this matter.

Counsel for plaintiff is requested to prepare and submit findings of fact and conclusions of law consistent herewith.

NOVEMBER 14, 1984.

ROBERT KRONINGER,
Special Master

In the United States District Court
Northern District of California

No. C-82-0916 JPV

Findings of Fact and Conclusions of Law

California and Hawaiian Sugar Company,
a California corporation,
Plaintiff,

vs.

Sun Ship, Inc., a Pennsylvania corporation,
Defendant.

And Related Cross Actions.

FINDINGS OF FACT

1. On November 14, 1979, California and Hawaiian Sugar Company ("CandH") and Sun Ship, Inc. ("Sun Ship") executed the Contract for the Construction of One Oceangoing Barge, etc. (the "Barge Contract").

2. Concurrently with the execution of the Barge Contract, CandH, Sun Ship, and Halter Marine, Inc. ("Halter") entered into the Interface Agreement, and CandH and Halter entered into the Contract for the Construction of One Oceangoing Catamaran Tug, etc. (the "Tug Contract").

3. The parties to the Barge Contract agreed that Pennsylvania law should control the construction of their rights and obligations under the Barge Contract.

4. Sun Ship's "Contract Work," is defined in the Barge Contract as consisting of the construction and delivery of the Barge.

5. Article 2 of the Interface Agreement provides that the "Contract Work" defined in the Barge Contract "shall include" Sun Ship's responsibility for interconnection and testing of the Barge and the Tug.

6. The Barge Contract required Sun Ship to complete construction of the Barge so that it could be delivered on or before

June 30, 1981 (the "Delivery Date"), unless that date was extended in accordance with the terms of the Barge Contract.

7. The Tug Contract required Halter to construct the Tug and to make it available at Sun Ship's shipyard at Chester, Pennsylvania, on or before April 30, 1981, unless that date was extended in accordance with the terms of the Tug Contract.

8. Sun Ship's obligation under the Barge Contract to complete the Barge by June 30, 1981, was independent of the Interface Agreement; and Sun Ship's duty diligently to execute its responsibilities under the Barge Contract was independent of Halter's obligation to perform under the Tug Contract.

9. Performance of neither the Tug Contract nor the Barge Contract was dependent, either expressly or in practice, on the other, and Sun Ship's duty to complete the Barge by June 30, 1981 was wholly separate from any obligation of Halter.

10. In the event that the construction of Barge was not completed by June 30, 1981, Sun Ship agreed to pay CandH $17,000 per day in liquidated damages for each day delivery of the Barge was delayed without excuse.

11. The damages anticipated by CandH and Sun Ship at the time of contracting in the event of a breach of the Barge contract ("the Anticipated Damages") included interest on progress payments, finance charges, damage to and possible loss of the Hawaiian sugar crop, loss of favorable sales opportunities, the expense of obtaining substitute tonnage, and the cost of additional time spent by the employees of CandH and its representative J. J. Henry.

12. The Anticipated Damages were in excess of $17,000 per day and bore a reasonable relationship to the liquidated damages stipulated in the Barge Contract.

13. Damages due to anticipated loss of charter revenues were not reasonably within the contemplation of the parties at the time of contracting.

14. During the period of Sun Ship's delay, alternative shipping was available to CandH, the sugar crop was harvested in a

timely way and the existence of any additional transportation expenses to CandH was uncertain.

15. Actual damages sustained by CandH as a result of Sun Ship's delay in performance of its contract work under the Barge Contract, and flowing from the delay in the completion of the Barge, included interest on progress payments, unfavorable terms of conversion to long-term financing, and additional labor expenses of CandH and of its representative, J. J. Henry. The amount of these actual damages bore a reasonable relationship to the amount liquidated in the Barge Contract.

16. Additional actual damages, if any, in the form of lost opportunities to time sales in the raw sugar market, to maximize the utilization of CandH's personnel, and to have solicited additional bids for construction of the Barge cannot be quantified by CandH as to amount.

17. A fair inference from the evidence is that earlier completion by either Sun Ship or Halter would have put pressure on the other to accelerate its work, would have inspired greater effort, and would have resulted in earlier availability of the completed unit.

18. Sun Ship was entitled to an extension of the Delivery Date for the Barge if completion of the Barge actually was delayed by the unavailability of the Tug.

19. Unavailability of the Tug would entitle Sun Ship to extension of the completion and delivery date of the Barge only if Sun Ship had complied with all Sun Ship's obligations under the Interface Agreement, to the extent possible notwithstanding unavailability of the Tug; Sun Ship's obligations under the Interface Agreement, as incorporated into the Barge Contract, included completion of the Barge by June 30, 1981.

20. Sun Ship failed to complete the Barge construction and to have it ready for delivery on or before June 30, 1981.

21. Sun Ship was not entitled to an extension of the Delivery Date prior to June 30, 1981, and Sun Ship's failure to complete the construction of the Barge by June 30, 1981 was not excused under the terms of the Barge Contract.

22. The Barge was not substantially completed and ready for delivery until March 16, 1982.

23. Prior to March 16, 1982, Tug unavailability did not actually cause any delay in the performance of any of the Contract Work by Sun Ship.

24. Sun Ship's failure to complete construction of the Barge and to have it ready for delivery to CandH by June 30, 1981 entitles CandH to recover liquidated damages at the contract rate and in the amount of $17,000 per day from July 1, 1981 to and including March 16, 1982.

25. CandH did not prove that the mating work could not have been completed by March 16, 1982 if the Tug had been made available when requested by Sun Ship.

26. The Tug was not made available to Sun Ship in its Chester, Pennsylvania, shipyard, as contemplated by the Barge Contract, and Sun Ship was thus unable to do the mating work and excused from doing so.

27. Sun Ship paid to CandH under a reservation of rights liquidated damages of $17,000 per day, the amount specified in the Barge Contract, for the period from June 30, 1981 through January 10, 1982.

28. CandH withheld from Sun Ship a Guarantee Payment equal to three-quarters of one percent (¾%) of the Contract Price payable as set forth in Article 4(g) and a Final Payment equal to three-quarters of one percent (¾%) of the Contract Price payable as set forth in Article 4(h) to which sums Sun Ship is entitled as offset against the liquidated damages due and owing CandH.

CONCLUSIONS OF LAW

1. The liquidated damages amount specified in the Barge Contract is reasonable when measured against actual and anticipated harm and the liquidated damages clause is valid and enforceable in accordance with its terms.

2. The liquidated damages paid by Sun Ship to CandH in the amount of $3,298,000 for the period from June 30, 1981, to and

including January 10, 1982, were properly paid and Sun Ship is not entitled to a refund thereof.

3. Sun Ship owes CandH additional liquidated damages from the period from January 11, 1982, to and including March 16, 1982, in the amount of $1,105,000, together with interest thereon calculated in accordance with the terms of the Barge Contract, at the contract rate, as accrued until paid, less setoffs as hereinafter.

4. Sun Ship is entitled to a Guarantee Payment equal to ¾% of the Contract Price, together with interest thereon at the contract rate, from September 16, 1982, until paid.

5. Sun Ship is entitled to a Final Payment equal to ¾% of the Contract Price, together with interest thereon at the contract rate, from March 23, 1983, until paid.

6. CandH's obligations to Sun Ship (paragraphs 4 and 5 above) may be set off against Sun Ship's obligation to CandH.

7. Sun Ship's obligation to perform contract work for completion of the barge under the Barge Contract was distinct from and independent of Sun Ship's obligation to perform interfacing of the barge with the tug and was distinct from and independent of Halter's performance under the Tug Contract.

DATED: December 20, 1984.

ROBERT H. KRONINGER

EXCERPTS FROM THE CONTRACT FOR THE CONSTRUCTION OF ONE OCEANGOING BARGE FOR CALIFORNIA AND HAWAIIAN SUGAR COMPANY BY SUN SHIP, INC. NOVEMBER 14, 1979

THIS CONTRACT, entered into as of this 14th day of November, 1979, by and between CALIFORNIA AND HAWAIIAN SUGAR COMPANY, a corporation organized under the laws of the State of California ("Purchaser"), and SUN SHIP, INC., a corporation organized under the laws of the Commonwealth of Pennsylvania ("Contractor"),

WITNESSETH:

WHEREAS, Purchaser desires to purchase and Contractor desires to build and sell one non-self-propelled oceangoing barge (the "Vessel"), to serve as part of an integrated tug barge unit (the "ITB"), which will be used in the coastwise trade of the United States of America; and

WHEREAS, Purchaser and Contractor have negotiated a price for construction of the Vessel in accordance with the provisions of this Contract and the Plans and Specifications, as defined in ARTICLE 2; and

WHEREAS, Purchaser has, concurrently with the execution of this Contract, entered into an agreement (the "Tug Contract") with Halter Marine, Inc., a corporation organized under the laws of the State of Louisiana (the "Tug Contractor"), for construction of the tug unit of the ITB (the "Tug");

NOW, THEREFORE, in consideration of the premises and of the mutual promises hereinafter set forth, the parties agree as follows:

ARTICLE 1. GENERAL STATEMENT OF WORK

(a) Contractor shall furnish all plant facilities, labor, materials, supplies and equipment, and shall perform all work, necessary to design (to the extent required by this Contract), engineer, construct, launch, outfit, test and deliver the Vessel, at its own risk and expense, in strict accordance with all of the terms and requirements of this Contract and the Plans and Specifications; and shall deliver the Vessel, in accordance with the terms set forth in this Contract with each and every feature of construction and design, and each and every other characteristic and feature, required in the Vessel by this Contract and the Plans and Specifications. Contractor shall also do everything else required of Contractor by this Contract and the Plans and Specifications (including the installation and stowage on board the Vessel of all Items of outfit and equipment which the Plans or Specifications provide shall be furnished by Purchaser), all for the total consideration set forth in ARTICLE 4. The obligations of Contractor, as set forth in this ARTICLE 1, are herein referred to as the "Contract Work."

(b) The Vessel shall be identified as Contractor's Hull Number 683, and shall be constructed at Contractor's plant or shipyard located at Chester, Pennsylvania (the "Shipyard").

(c) The Contract Work shall be timely commenced after the execution of this Contract and shall be prosecuted with due diligence thereafter. Contractor shall deliver the Vessel to Purchaser pursuant to ARTICLE 17 on or before 12:00 noon local time on June 30, 1981, which date, as it may be extended or accelerated to the extent expressly so provided in this Contract, shall hereinafter be referred to as the "Delivery Date".

* * *

ARTICLE 7. EXTENSION OF TIME FOR COMPLETION OF WORK

(a) If

(i) Contractor shall have transmitted written notice to Purchaser of a cause delaying completion of the Contract Work; and

(ii) such notice shall have been transmitted within fourteen (14) days after the date on which Contractor had knowledge of such cause of delay, or within fourteen (14) days after the date on which Contractor, after reasonably diligent inquiry, should have had knowledge of such cause of delay, whichever is the earlier date; and

(iii) such cause of delay is one of the causes set forth in ARTICLE 7(b),

Contractor shall be entitled to an extension of the Delivery Date by the number of days that the Delivery Date will actually be delayed by such cause.

(b) Contractor shall be entitled to an extension of the Delivery Date, as provided in ARTICLE 7(a), for any delay caused by Purchaser (other than such delays, if any, as are caused by Purchaser in exercising any or all of its rights or duties under this Contract if Purchaser is not then in material violation of this Contract), it being agreed that the provisions of this ARTICLE 7 shall be exclusive of all other rights or remedies on account of such delay; or by causes beyond the reasonable control of Contractor such as (but not limited to) those caused by government priorities; by war or preparation for war; by naval or military authorities; by United States, state, regional and local civil authorities (other than such delays, if any, as are caused by Contractor's failure to comply with applicable law); by acts of God (other than ordinary storms or ordinary inclement weather conditions), earthquakes, hurricanes, lightning, floods, or landslides; by strikes, lockouts, or other labor disturbances; by such explosions, fires and vandalism as are the result of causes reasonably beyond Contractor's control; by riots, insurrections, sabotage, blockades, embargoes or epidemics; by the unavailability of the Tug to Contractor for joining to the Vessel, where it is determined that Contractor has complied with all obligations under the Interface Agreement; by the short or late delivery to Contractor of Items required to be incorporated in the Vessel, where it is determined that Contractor's contracting for such Items was expeditious and prudent and that Contractor has made good faith efforts to procure full and prompt delivery of such Items or, if appropriate in Contractor's reasonable business judgment,

equivalent substitute performance; by delay in performance by a vendor or subcontractor where it is determined that Contractor's choice of the vendor or subcontractor was reasonable and prudent and that Contractor has made good faith efforts to procure prompt performance by the vendor or subcontractor or, if appropriate in Contractor's reasonable business judgment, equivalent substitute performance, by delays of carriers by land, sea or air where it is determined that Contractor's contracting for such services was expeditious and prudent and that Contractor has made good faith efforts to procure prompt delivery or, if appropriate in Contractor's reasonable business judgment, equivalent substitute performance; and by any unavailability of persons, material, plans or records required in the Contract Work due to the need for such persons, material, plans or records in any arbitration proceeding under this Contract, where such unavailability (or any delay resulting therefrom) could not reasonably have been avoided by Contractor.

ARTICLE 8. LIQUIDATED DAMAGES FOR DELAY IN DELIVERY

(a) In the event that Delivery of the Vessel is not made on or before 12:00 noon local time on the Delivery Date, Purchaser will suffer damages which are extremely difficult of ascertainment. It is agreed that the sum of SEVENTEEN THOUSAND DOLLARS ($17,000) per day represents a reasonable measure of the damages to Purchaser for each day, or part thereof, of delay in Delivery of the Vessel, and Contractor shall pay said sum to Purchaser as per-day liquidated damages, and not as a penalty, for each calendar day or part thereof elapsing from the Delivery Date, without any grace period, until Delivery of the Vessel is made.

(b) All payments required to be made by Contractor under ARTICLE 8(a) shall be made on a monthly basis, in arrears, commencing on the 30th day after Delivery of the Vessel has been delayed beyond the Delivery Date, and continuing on the same day of each succeeding calendar month thereafter, until the day on which delivery of the Vessel is made, at which time Contractor shall pay the entire remaining amount due under this ARTICLE 8 through such time of Delivery.

(c) The payment of such sums as may become due to Purchaser under this ARTICLE 8 shall not affect any rights of Purchaser as to matters other than late Delivery of the Vessel, or any rights of Purchaser under ARTICLE 21(a).

* * *

ARTICLE 17. DELIVERY

(a) When the Vessel is Substantially Complete, and all trials and tests of the Vessel and the ITB required by ARTICLE 16 have been completed, or at such earlier time as is provided in ARTICLE 17(d), the Vessel shall be offered for delivery, as set forth in this ARTICLE 17(a). The Vessel shall be deemed to be "Substantially Complete" when it is free from all Deficiencies, except for such minor Deficiencies as do not prevent the granting of all approvals, certificates and other documents of Regulatory Bodies called for by this Contract or the Plans or Specifications and do not materially affect the commercial utility or safe operation of the Vessel in its intended trade. The Vessel shall be offered for delivery fully and completely connected with the Tug, with not less than five (5) days prior written notice to Purchaser: (i) alongside a safe and accessible pier at the Shipyard, where there must be sufficient water for the ITB to always be afloat, custom to the contrary notwithstanding; or (ii) at Purchaser's option, at another seaport located within the continental United States or at sea; *provided* that if Purchaser shall elect to take Delivery of the Vessel at any location other than the Shipyard, it shall pay to Contractor, at Delivery of the Vessel, as an addition to the Contract Price, a sum which is equal to the incremental cost of delivering the Vessel at such other location. The Vessel thus offered shall be free and clear of all liens, claims, charges, security interests of encumbrances of any nature whatsoever except as may have been created by Purchaser (other than those in favor of Contractor or any other person in connection with entering into or carrying out this Contract) or exist in Purchaser's favor. Such offer of delivery of the Vessel shall also be accompanied by an offer of delivery of the following documents (hereinafter the "Delivery Documents"):

(i) Protocol of Delivery and Acceptance acknowledging Delivery of the Vessel to, and acceptance and taking possession of the Vessel by, Purchaser in accordance with this Contract, executed in duplicate by Contractor. Such Protocol shall state the date and time of such Delivery and acceptance.

(ii) Declaration of Warranty of Contractor that the Vessel is delivered to Purchaser free and clear of any liens, claims, charges, security interests or encumbrances of any nature whatsoever except as may have been created by Purchaser other than those in favor of Contractor or any other person in connection with entering into or carrying out this Contract) or exist in Purchaser's favor, and that the Vessel is absolutely free of all burdens in the nature of import duties, taxes or charges imposed by the city, county, state, parish and port of Delivery.

(iii) Instruments confirming that title to the Vessel has vested in Purchaser, as provided herein, in such number and form as may reasonably be requested by Purchaser.

(iv) Contractor's Certificate as to construction of the Vessel within the United States.

(v) Declaration of Warranty of Contractor that the Vessel is delivered to Purchaser free and clear of any liens, claims, charges, security interests or encumbrances of any nature whatsoever in favor of Contractor or its subcontractors, agents, employees or creditors, or arising from the construction of the Vessel or its operation in trial runs or otherwise arising prior to Delivery and acceptance, excluding any which arise solely out of the act, neglect or default of Purchaser (other than the entering into and carrying out of this Contract).

(vi) Certificate of License and Enrollment for the Vessel, issued in name of Purchaser and entitling Vessel to all coastwise privileges.

(vii) All other requisite certificates, including but not limited to those set forth in the Specifications.

Contractor shall, as promptly as practicable after Delivery, cause to be furnished to Purchaser: ABS Final Load Line Certificate; ABS Class Certificate; USCG Final Certificate of Inspection; USCG Approved Final Trim, Stability and Stress Booklet; and USCG Final Stability Letter.

(b) If (i) at the time an offer of Delivery of the Vessel is made, the Vessel shall be Substantially Complete and it and the ITB have completed all tests and trials under ARTICLE 16 and under the Tug Contract, and (ii) such offer shall be accompanied by an offer of delivery of the Delivery Documents, and (iii) Purchaser shall at the time of such offers be obligated to accept similar offers from the Tug Contractor as to the Tug, the Vessel and the Delivery Documents shall thereupon be accepted by Purchaser in accordance with ARTICLE 17(c). If Purchaser shall at the time of such offers not be obligated to accept similar offers from the Tug Contractor as to the Tug, Contractor shall have the rights set forth in ARTICLE 4(g)(ii). If, at such time, any of such conditions shall not be satisfied, Purchaser shall be entitled to refuse acceptance of such Vessel by thereupon delivering to Contractor a written specification of such unsatisfied condition. Any subsequent offer or offers of delivery shall be made and accepted on the terms set forth in ARTICLE 17(a) and ARTICLE 17(b).

(c) Acceptance of the Vessel by Purchaser shall be accomplished by: (i) the delivery to Contractor of a counterpart of the Protocol of Delivery and Acceptance executed by Purchaser; and (ii) the payment by Purchaser to Contractor of that portion of the Contract Price which Purchaser is required to pay pursuant to Article 4 upon Delivery of the Vessel. Purchaser may (but shall not be obligated to) specify in the Protocol of Delivery and Acceptance to be delivered by it such Deficiencies as may be known to exist in the Vessel at the time the Vessel is accepted. Such Deficiencies shall thereafter be deemed to be and shall be treated as Deficiencies arising during the Guarantee Period. If Delivery be made at the Shipyard, Purchaser shall be afforded five (5) days free of any dockage or other charge, and up to twenty-five (25) additional days at a reasonable dockage fee,

within which to remove the ITB from the Shipyard or a docking area reasonably adjacent thereto.

(d) Notwithstanding anything to the contrary in this Contract, Purchaser may, at its option, demand Delivery of the Vessel at any time (whether prior or subsequent to the time established for the offer of Delivery of the Vessel pursuant to ARTICLE 17(a)) if the Vessel is, at the time of such demand, in such state of completion that Purchaser is able to obtain approval of the operation of the Vessel from all Regulatory Bodies having jurisdiction over the Vessel's operations. Contractor shall, within five (5) days of any demand by Purchaser pursuant to the preceding sentence, offer the Vessel for Delivery to Purchaser in accordance with the first sentence of ARTICLE 17(a), together with such of the Delivery Documents, if any, as can be obtained by Contractor as of the date of such offer and Contractor's estimate of the Contract Price reduction, if any, specified in the immediately following sentence, and such offer shall be accepted by Purchaser in accordance with ARTICLE 17(c); *provided* that Purchaser may, in addition to the remaining amounts withheld pursuant to ARTICLE 4(c) (but without prejudice to Contractor's rights set forth in this ARTICLE 17(d) as to adjustments in the Contract Price), reduce the payment due to Contractor upon Delivery by Purchaser's reasonable estimate of such Contract Price reduction. Purchaser's demand pursuant to this ARTICLE 17(d) shall be deemed a proposal of an Article 5 Change deleting the Contract Work not yet completed, and the Contract Price shall be adjusted, and documentation prepared by Contractor, accordingly. All disputes arising under this ARTICLE 17(d) with respect to Amendments or Contract Price reductions required on account of delivery of a Vessel under this ARTICLE 17(d) shall be referred to the Arbitrator for resolution, and Contractor shall have no right to refuse to offer the Vessel for Delivery on account of any such dispute.

(e) For purposes of this Contract, "Delivery" shall have occurred only when the Vessel has been offered to and accepted by Purchaser in accordance with this ARTICLE 17. Acceptance of the Vessel by Purchaser under this ARTICLE 17 shall not be deemed to constitute a waiver of, or otherwise prejudice, Pur-

chaser's rights under ARTICLE 18 with respect to any Deficiency, whether known or unknown, whether patent or latent and whether or not noted in any documents delivered in connection with Delivery of the Vessel, which may exist at the time the Vessel is accepted by Purchaser, and shall not be deemed to constitute a waiver of, or otherwise prejudice, Purchaser's rights under ARTICLE 12. Any such Deficiency may be reported to and shall be corrected at the sole cost and expenses of Contractor as provided in ARTICLE 18.

(f) Notwithstanding anything to the contrary in this ARTICLE 17, Purchaser shall not be obligated to accept Delivery of the Vessel prior to its Delivery Date.

EXCERPTS FROM THE INTERFACE AGREEMENT BETWEEN C&H, SUN SHIP AND HALTER

This Interface Agreement is entered into as of the 14th day of November, 1979 among CALIFORNIA AND HAWAIIAN SUGAR COMPANY, a California corporation ("Purchaser"), HALTER MARINE, INC., a Louisiana corporation ("Tug Contractor"), and *SUN SHIP, INC.*, a Pennsylvania corporation ("Barge Contractor").

RECITALS

A. Purchaser has entered into a Contract (the "Tug Contract") for the Construction of One Oceangoing Catamaran Tug (the "Tug") with Tug Contractor dated November 14, 1979, and has entered into a Contract (the "Barge Contract") for the Construction of One Oceangoing Barge (the "Barge") dated November 14, 1979 with Barge Contractor.

B. The Tug and Barge are designed to be, and will be, operated as an integrated tug barge ("ITB").

C. Purchaser, Tug Contractor and Barge Contractor wish to allocate responsibilities among themselves as to certain matters relating to the physical, mechanical, piping, electrical and other connections between the Tug and the Barge (collectively, the "Tug-Barge Interface") and certain other matters.

NOW, THEREFORE, in consideration of the premises and of the promises herein set forth, Purchaser, Tug Contractor and Barge Contractor agree as follows:

* * *

ARTICLE 2. CONNECTION

Barge Contractor hereby agrees with Purchaser that the "Contract Work" under the Barge Contract (as such quoted term is defined in the Barge Contract) shall include the making and maintaining of a full, tight and staunch connection, ready for use in the service intended, of the Tug to the Barge, in all aspects of

the Tug-Barge Interface, in accordance with the Tug Plans and Specification, the plans and specifications applicable to the Barge under the Barge Contract (the "Barge Plans and Specifications") and Exhibit A attached hereto, including any adjustments, repairs and other work, performed either on the Tug or the Barge, reasonably necessary to make and maintain such a connection. (The making and maintaining of such connection is herein called the "Connection Work.") All Connection Work shall be carried out by Barge Contractor in a good and workmanlike manner and in accordance with good shipbuilding practice. Prior to Delivery of the ITB, Purchaser and Barge Contractor shall have the same rights and obligations with respect to the Connection Work as they have with respect to other Contract Work under the Barge Contract. Barge Contractor's obligation to perform Connection Work shall continue after Delivery of the ITB to the same extent and on the same terms as its obligations to make good "Deficiencies," as such quoted term is defined in the Barge Contract ("Barge Deficiencies"). Any Connection Work after Delivery of the ITB shall be carried out on the same terms as set forth in ARTICLE 18 of the Barge Contract.

* * *

ARTICLE 4. ITB SEA TRIAL

(a) Not less than ninety (90) days prior to the initial sea trial of the ITB, Barge Contractor shall deliver to Tug Contractor and Purchaser a detailed agenda for such sea trial. Within fourteen (14) Business Days thereafter, Tug Contractor and Purchaser may each either: (i) approve such agenda; or (ii) reject such agenda on the ground that it does not comply with the Tug Plans and Specifications, the Barge Plans and Specifications or paragraph 11 of the memorandum of understanding attached hereto as Exhibit A. If either Tug Contractor or Purchaser gives neither response within such period, such party shall be deemed to have approved such agenda.

(b) Barge Contractor shall bear the expense of the initial sea trial of the ITB. Tug Contractor shall use its best efforts to make the members of its crew on the Tug's voyage to the Barge

Contractor's shipyard available for operations of the Tug in its connection with the Barge and at sea trials of the ITB.

(c) If, at and upon any sea trial of the ITB, a Barge Deficiency shall be discovered in the Barge, Barge Contractor shall at its own expense correct the same and then make such further trials and tests as may be necessary to reasonably demonstrate complete correction thereof; *provided* that additional sea trials will not be required if the correction of such Barge Deficiency can be verified in shop or dock trials or tests. If additional sea trial of the ITB are required in part or in whole to verify correction of such Barge Deficiency, then Barge Contractor shall bear the entire expense thereof.

(d) If, at and upon any sea trial of the ITB, a Tug Deficiency shall be discovered, such Tug Deficiency shall be made good as set forth in this Agreement, and Barge Contractor shall make such further trials and tests as may be necessary to reasonably demonstrate complete correction thereof; *provided* that additional sea trials will not be required if the correction of such Tug Deficiency can be verified in shop or dock trials or tests. If additional sea trials of the ITB are required solely to verify correction of such Tug Deficiency, then Tug Contractor shall pay the entire expenses thereof.

(e) If, at and upon any sea trial of the ITB, a deficiency in the Tug-Barge Interface is discovered, it shall be corrected pursuant to ARTICLES 2 and 3.

(f) Purchaser and Tug Contractor shall each have the right to have one or more representatives on board the ITB during the initial and any subsequent sea trials. Barge Contractor shall give five (5) Business Days advance notice to Purchaser and Tug Contractor of any ITB sea trial.

EXCERPTS FROM THE CONTRACT FOR THE CONSTRUCTION OF ONE OCEANGOING CATAMARAN TUG

FOR

CALIFORNIA AND HAWAIIAN SUGAR COMPANY

BY

HALTER MARINE, INC.
NOVEMBER 14, 1979

THIS CONTRACT, entered into as of this 14th day of November, 1979, by and between CALIFORNIA AND HAWAIIAN SUGAR COMPANY, a corporation organized under the laws of the State of California ("Purchaser") and HALTER MARINE INC., a corporation organized under the laws of the State of Louisiana ("Contractor")

W I T N E S S E T H

WHEREAS, Purchaser desires to purchaser and Contractor desires to build and sell one oceangoing catamaran tug boat (the "Vessel"), to serve as part of an integrated tug barge unit (the "ITB"), which will be used in the coastwide trade of the United States of America; and

WHEREAS, Purchaser and Contractor have negotiated a price for construction of the Vessel in accordance with the provisions of this Contract and the Plans and Specifications, as defined in ARTICLE 2; and

WHEREAS, Purchaser has, concurrently with the execution of this Contract, entered into an agreement (the "Barge Contract") with Sun Ship, Inc., a corporation organized under the laws of the Commonwealth of Pennsylvania (the "Barge Contractor"), for construction of the barge unit of the ITB (the "Barge"); and

WHEREAS, Purchaser, Contractor and the Barge Contractor have, concurrently with their respective executions of this Contract and the Barge Contract, entered into an interface agreement (the "Interface Agreement") of even date herewith relating to the connection between the Barge and the Tug and certain other matters;

NOW, THEREFORE, in consideration of the premises and of the mutual promises hereinafter set forth, the parties agree as follows:

ARTICLE 1. GENERAL STATEMENT OF WORK

(a) Contractor shall furnish all plant facilities, labor, materials, supplies and equipment, and shall perform all work necessary to contract, launch, outfit, test and deliver the Vessel, including the preparation of working drawings, at its own risk and expense, in strict accordance with the provisions of this Contract and the Plans and Specifications. Contractor shall also do everything else required of Contractor by this Contract and the Plans and Specifications (including the installation and stowage on board the Vessel of all Items of outfit and equipment which the Plans or Specifications provide shall be furnished by Purchaser), all for the total consideration set forth in ARTICLE 4. The obligations of Contractor, as set forth in this ARTICLE 1, are herein referred to as the "Contract Work."

(b) The vessel shall be identified as Contractor's Hull Number 943, and shall be constructed primarily at Contractor's plant or shipyard in the Port of Chickasaw, Alabama (the "Shipyard").

(c) The Contract Work shall be timely commenced after the execution of this Contract and shall be prosecuted with due diligence thereafter. On or before 12:00 noon local time on April 30, 198 (which date, as it may be extended or accelerated pursuant to the express provisions of this Contract, is herein referred to as the "Availability Date"), the Vessel shall be Substantially Complete; all shop, dock, sea and other trials and tests required by the Plans and Specifications and this Contract (other than sea trials of the ITB), including any correction of Deficiencies discovered at and upon such trials and tests and any necessary additional trials and test, shall have been satisfactorily performed; the Vessel shall have been sailed to the Barge Contractor's shipyard ("the Barge Shipyard") located at Chester, Pennsylvania) and the Vessel shall have been made available to the Barge Contractor for connection with the Barge and for ITB sea trials.

* * *

ARTICLE 7. EXTENSION OF TIME FOR COMPLETION OF WORK

(a) If Contractor shall have transmitted written notice to Purchaser of a cause delaying the making available of the Vessel as set forth in ARTICLE 1(c) not later than twenty (20) Business Days after the date on which Contractor had knowledge of such cause of delay, and such cause of delay is beyond the control of Contractor as provided in ARTICLE 7(b), and Contractor has not prolonged the delay attributable to such cause and has exercised due diligence in limiting and minimizing the effect of any such cause, contractor shall be entitled to an extension of the Availability Date by the number of days that the Availability Date was delayed by such cause.

(b) Contractor shall be entitled to an extension of the Availability Date, as provided in ARTICLE 7(a), for any cause of delay beyond the reasonable control of Contractor such as (but not limited to) those caused by the following: strikes or other industrial disturbances (provided Contractor does not unreasonably prolong any such strike or other industrial disturbance); acts of God (other than abnormal weather conditions), abnormal weather conditions (meaning rain, snow, sub-freezing temperature, hail, sleet, winds, or combination thereof, which shall cause Contractor to suspend work for periods in excess of Contractor's past experience); acts of Purchaser or of Regulatory Bodies (which delay is not caused by Contractor's failure to comply with this Contract); war; the act of Civil, Naval or Military authorities (which delay is not caused by Contractor's failure to comply with applicable law or regulations); arrests and restraints of rulers and people; Government priorities; blockade; sabotage; vandalism; insurrection; floods, hurricanes, earthquakes; fires; epidemics; weather conditions which prevent or suspend trials or the voyage to the Barge Shipyard; the late delivery to Contractor of Contract-required machinery, equipment and supplies to be incorporated in the Vessel where it is determined that Contractor's contracting for such machinery, equipment and supplies to be incorporated in the Vessel was expeditious and prudent, and

Contractor has exercised due diligence (and sustains the burden of proof thereof) in the performance of any acts required of Contractor and that Contractor has exercised due diligence (and sustains the burden of proof thereof) in its expediting of deliveries under Contractor's purchase contract or in seeking equivalent substitute performance where such supplier is in default and *provided* that Contractor shall have used its best efforts to prevent the inclusion in its contracts with the supplier of provisions for force majeure less favorable to it than these provisions or, alternatively, has no force majeure provision in such contracts; the late performance or default of a subcontractor where it is determined that Contractor's choice of said subcontractor was reasonable and responsible and Contractor has exerted all reasonable efforts (and sustains the burden of proof thereof) to expedite performance, avoid default or procure reasonable substitute performance where such subcontractor is in default, and *provided* that Contractor shall have used its best efforts to prevent the inclusion in its contracts with the subcontractors of provisions for force majeure less favorable to it than these provisions, or, alternatively, has no force majeure provision in such contracts.

(c) Notwithstanding anything to the contrary in this ARTICLE 7, Contractor shall not be entitled to any extension of the Availability Date for:

(i) for any delay resulting from a cause of delay in existence on the date of this Contract (other than a cause of delay determined to be industry-wide), or

(ii) for any delay resulting from the late performance or default of a vendor, subcontractor or carrier (whether for delivery of machinery, equipment or supplies to be incorporated in the Vessel or otherwise), if such delay results from the continuation of a cause of delay in effect on the date of the award of the contract, where Contractor, exercising due diligence had notice of such subcontractor's cause of delay prior to or at the time of such award (other than a cause of delay determined to be industry-wide).

(d) Within twenty-five (25) days (or such longer period as may be allowed by Purchaser) after a cause of delay set forth in

ARTICLES 7(a) and (b) has ceased to exist, Contractor shall furnish to Purchaser a written statement of the actual or estimated delay in making the Vessel available as set forth in ARTICLE 1(c) resulting from such cause, accompanied by such detailed documentation as is reasonably available to Contractor.

ARTICLE 8. LIQUIDATED DAMAGES FOR DELAY IN DELIVERY

(a) In the event that the Vessel is not made available as set forth in ARTICLE 1(c) at the Barge Shipyard on or before 12:00 noon local time on the Availability Date, Purchaser will suffer damages which are extremely difficult of ascertainment. It is agreed that the sum of TEN THOUSAND DOLLARS ($10,000) per day represents a reasonable measure of the damages to Purchaser for each day, or part thereof, of delay in such availability of the Vessel, and Contractor shall pay said sum to Purchaser as per-day liquidated damages, and not as a penalty, for each calendar day or part thereof elapsing from the Availability Date, without any grace period, until the Vessel is made so available.

(b) All payments required to be made by Contractor under ARTICLE 8(a) shall, upon agreement or other determination pursuant to ARTICLE 32 that the Vessel has not been made so available on or before the Availability Date, be made on a monthly basis, in arrears, commencing on the thirtieth (30th) day after the Availability Date, and continuing on the same day of each calendar month until the day on which the Vessel is made so available, at which time Contractor shall pay the entire remaining amount due under this ARTICLE 8 through such time of availability.

(c) The payment of such sums as may become due to Purchaser under this ARTICLE 8 shall not affect any rights of Purchaser as to matters other than such late availability of the Vessel, or any rights of Purchaser under ARTICLE 21(b).

* * *

ARTICLE 17. DELIVERY

(a) When the Vessel is Substantially Complete, and all trials and tests required by ARTICLE 16, including any corrections of Deficiencies discovered at and upon such trials and tests and any necessary additional trials and tests, have been satisfactorily performed, Contractor shall offer the Vessel for Delivery as set forth in this ARTICLE 17. The Vessel shall be deemed to be "Substantially Complete" when it is free from all Deficiencies, except for such minor Deficiencies as (i) do not prevent the granting of all approvals, certificates and other documents of Regulatory Bodies called for by this Contract or the Plans or Specifications, or (ii) do not materially affect the seaworthiness or habitability of the Vessel or the ITB or the Commercial utility of the Vessel or the ITB in its intended trade. (Purchaser may, at its option, certify that any remaining Deficiencies do not materially affect such seaworthiness, habitability or utility, which certificate shall be conclusive for purposes of this ARTICLE 17.) The Vessel shall be offered for Delivery fully and completely connected with the Barge, with not less than five (5) days prior written notice, to Purchaser: (i) alongside a safe and accessible pier at the Barge Shipyard where there must be sufficient water for the ITB to always be afloat, custom to the contrary notwithstanding; or (ii) at Purchaser's option, at another seaport located within the continental United States or at sea, *provided* that if Purchaser shall elect to take Delivery of the Vessel at any location other than the Barge Shipyard, it shall pay to Contractor, at Delivery of the Vessel, as an addition to the Contract Price, a sum which is equal to one hundred ten percent (110%) of the difference between the costs incurred by Contractor in delivering the Vessel at such location and the costs which would have been incurred by Contractor had delivery been made at the Barge Shipyard.

AFFIDAVIT OF HAROLD P. HALTER

STATE OF LOUISIANA
PARISH OF ORLEANS

I, Harold P. Halter, being duly sworn do state:

1. I am a resident of the State of Louisiana.

2. I am familiar with events surrounding the construction of a catamaran tug boat for California & Hawaiian Sugar Company ("C & H") in that I was Chairman of Halter Marine, Inc. ("Halter Marine") during the time the vessel was being constructed.

3. It was my understanding that the vessel that Halter Marine was building for C & H was to be delivered to Sun Ship, Inc. ("Sun Ship") at its Chester, Pennsylvania shipyard so that Sun Ship could perform necessary work to mate the catug to a barge that Sun Ship was constructing. The resulting vesssel, an Integrated Tug-Barge was then to be delivered to C & H.

4. I am familiar with the ITB concept and know that Sun Ship could not deliver an ITB to C & H without a tug portion.

5. During construction, Halter Marine determined that the basic design of the catug was defective and that operating the Catug on the open seas would constitute a risk of life and property. Accordingly, Halter Marine with my approval refused to "sail" the C & H tug to Sun Ship's shipyard absent modifications that would make the vessel safe. C & H, and its agent, J.J. Henry Company, refused to make any modifications. As a result, I believe that Halter was excused from any obligation to make the Tug available at Chester, Pennsylvania.

6. During the course of construction, various delays on completion were experienced by Halter Marine which were beyond its control and which were in many cases the result of the actions and omissions of J.J. Henry Company, acting as a representative of C & H. As a result of these delays, Halter Marine filed *force majeure* claims and claimed entitlement to an extension of the catug Availability Date. The extensions sought would have been

beyond the July 15, 1982 actual completion date. I believe that Halter Marine was entitled to such extensions.

7. On October 25, 1982, with my approval, Halter Marine entered into a settlement with C & H in which Halter's claims against C & H were offset against claims C & H made against Halter Marine. I do not believe C & H's claims had any validity, and do believe Halter Marines's were valid. Nevertheless, because Halter Marine was already involved in a major lawsuit in New York, I approved the settlement.

8. It is my belief that the settlement extended the Halter Tug Availability Date to at least July 15, 1982.

9. It is my belief that the value of the claims that Halter Marine released against C & H, which included claims for cost overruns, costs incurred in building the Tug to standards in excess of plans and specifications, delay and disruption, lost profits and lost reputation, exceeded that of claims C & H made against Halter Marine.

10. I believe that as of July 15, 1982, C & H claimed $4,000,000 in liquidated damages plus consequential damages.

11. The foregoing is based upon my personal knowledge. If I were able to testify at trial in this matter, I would testify in accordance with the foregoing.

/s/
HAROLD P. HALTER

SWORN TO AND SUBSCRIBED
BEFORE ME THIS 8th DAY OF
NOVEMBER, 1984.

/s/
NOTARY PUBLIC